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THE UNIVERSITY OF ALBERTA

"THE PARAMETERS OF NATURAL JUSTICE IN CANADIAN LAW"

by

© WILLIAM WESLEY THOMAS PUE

A THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled "THE PARAMETERS OF NATURAL JUSTICE IN CANADIAN LAW" submitted by WILLIAM WESLEY THOMAS PUE in partial fulfilment of the requirements for the degree of Master of Laws.

(Supervisor)

Michael Park

Date August 1, 1980

TO

MY PARENTS

BILL AND DEBBIE PUE

ABSTRACT

The author investigated the scope, applicability, and content of the common law principles of procedural fair play (natural justice) in Canadian law. An attempt was made to outline a new approach to natural justice which is consistent with the evolution of the law consequential upon the decision of the English House of Lords in RIDGE v. BALDWIN and the Supreme Court of Canada in MARTINEAU (#2). It was argued that the principles are of universal applicability, but that the content of natural justice is variable, being in any given case only what is reasonable to meet the requirements of substantial fair play. This was seen as a welcomed development, providing an administrative law equivalent to the reasonable man test of DONOGHUE v. STEVENSON.

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Wesley Pue,
Yellowknife, N.W.T.
August, 1980

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ABBREVIATIONS USED

A.C.	Law Reports, Appeal Cases
A.E.R.	All England Reports
A.I.R.	All India Reports
A.L.J.	Australian Law Journal
Alta. L.R.	Alberta Law Reports
A.R.	Alberta Reports
B.C.R.	British Columbia Reports
C.B. (N.S.)	Common Bench Reports (New Series)
C.B.R.	Canadian Bar Review
C.C.C.	Canadian Criminal Cases
Ch.	Law Reports, Chancery
Ch. Div.	Law Reports, Chancery Division
C.L.J.	Cambridge Law Journal
C.L.R.	Commonwealth Law Reports
Cl. & F.	Clark & Finnelley
C. Rep.	Coke's Reports
Crim. L.Q.	Criminal Law Quarterly
D.L.R.	Dominion Law Reports
D.T.C.	Dominion Tax Cases
E. & B.	Ellis & Blackburn's English Queen's Brench Reports
Ex. C.R.	Exchequer Court Reports
F.C.	Federal Court Reports
H.M.S.O.	H.M. Stationery Office
Hob.	Hobart's English King's Bench Reports
J.P.L.	Journal of Planning Law

K.B.	Law Reports, King's Bench
L.G.R.	Local Government Reports
L.R. Ch. App.	Law Reports, Chancery Appeals
L.R. Ex.	Law Reports, Exchequer
L.R. H.L.	Law Reports, House of Lords
L.Q.R.	Law Quarterly Review
L.T.	Law Titles
Mac. & G.	MacNaughten & Gordon's English Chancery Reports
McGill L.J.	McGill Law Journal
Man. R,	Manitoba Reports
Mod.	Modern Reports, 1699-1732
M.L.R.	Moder Law Review
Mon. U.L.R.	Monash University Law Review
N.I.L.Q.	Northern Ireland Legal Quarterly
N.R.	National Reporter
N.S.W.L.R.	New South Wales Law Review
N.S.W.R.	New South Wales Reports
N.Z.L.J.	New Zealand Law Journal
N.Z.L.R.	New Zealand Law Reports
Q.A.R.	Ontario Appeal Reports
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports
Ott. L.R.	Ottawa Law Review
O.W.R.	Ontario Weekly Notes
P.L.	Public Law
Q.B.	Queen's Bench Reports
Q.B.D.	Law Reports, Queen's Bench Division

Qd. R.	Queensland Reports
Q.R.	Quebec Reports
Que. S.C.	Quebec Official Reports, Superior Court
S.C.R.	Supreme Court Reports
Str.	Strange's King's Bench Reports
U.T.L.J.	University of Toronto Law Journal
W.L.R.	Weekly Law Reports
W.W.R.	Western Weekly Reports

CHAPTER I

INTRODUCTION

> "The idea of justice contemplates at least an independent and impartial judge, who founds his judgment on evidence and reason."
> -Lord Hewart of Bury, 1929(1)

In "The Discipline of Law(2) Lord Denning characterizes the twentieth Century as a period of increasing government control over the lives of individual citizens. In sharp contrast to the laissez-faire approach of the nineteenth century modern governments - even in "capitalist" societies - "regulate housing, employment, planning, social security, and a host of other activities. The philosophy of the day is socialism or collectivism."(3) Nor is it the government alone that has come to exercise ever-greater control over individuals with the passage of time: the twentieth century has seen a considerable increase in trade union power(4), and the decisions of University governing bodies(5), regulatory bodies(6), and professional associations(7) may have an effect on persons subject to their power which stretches far in both time and space. For his Lordship "The great problem before the Courts in the twentieth century has been: In an age of increasing power, how is the law to cope with the abuse or misuse of it?".(8)

The question has significance stretching far beyond any particular instance in which a citizen may feel himself agrrieved by the misuse of power. The English constitution(9) is said to be characterized by the rule of law.(10) In a succinct summary of Dicey's work written some fifty years ago Lord Hewart wrote that "[t]he statement means, first, that in England no man can be punished, or can be lawfully made to suffer either in his body or in his goods, except for a distinct breach of law established in the ordinary legal manner before the ordinary courts."(11)

If indeed this principle is a fundamental component of the rule of law it can only be assumed - in the absence of some other factor - that the supremacy of the law is seriously in doubt in the late twentieth century. It is all too apparent that any number of bodies, persons and tribunals quite apart from the "ordinary courts" can act to the detriment of individuals.(12) Even the most ardent supporter of the common law Courts however would not suggest that the roles of tribunals, government agencies, trade unions, and professional or regulatory bodies should - or even could - be taken over by the "ordinary courts" to which Lord Hewart referred. Despite similarities in some of their functions these agencies usually play roles for which the Courts of Law are fundamentally ill-suited(13) and frequently operate in areas in which the Courts have little or no expertise.(14)

Taking account of the needs of modern society, therefore, the rule of law must be upheld not by the Courts themselves taking every decision which may adversely affect the interests of individuals, but rather by assuring that they are potent to ensure that such bodies act only within the area of their legitimate jurisdiction and, moreover, that their procedures are such that decisions are reached only by an "impartial judge who founds his judgment on evidence and reason."(15) It is the object of this thesis to investigate one limb of this second means utilized by the courts to preserve the rule of law.

(1) FAIR PROCEDURE

The importance of fair procedure has been stressed by a number of lawyers, both on and off the bench. Judicial enforcement of procedural fairness does not, of course, ensure that the decisions made will be correct or "fair". It does however help to ensure that the decision is the fairest possible having regard to the limitations and abilities of those who make it. Schwartz and Wade have stated the case in strong terms:

> Procedural fairness is what makes intensive government tolerable. A decision reached after fair consideration of every side of the case will not only appear less arbitrary: it will most probably also be less arbitrary. Furthermore, the judges can assert their authority with confidence. They are experts in fair procedure, and in insisting on it they are in no way interfering with the substance of executive decisions.(16)

If, then, judicial enforcement of some standards of fair procedure is essential to any system of government under the law, it is important to determine on what basis the Courts purport to interfere with the procedures of other decision-making bodies. Anglo-Canadian law has no equivalent to the "due process" clause of the American constitution on which to base the enforcement of fair procedure. It has been argued that the modern approach of the courts is that they will enforce procedural fairness on other bodies only if a term providing for fair procedure can be implied in the relevant contract or statute.(17) Leaving aside for the present the accuracy of that view as regards the modern cases(18) it is reasonably clear that it is not an accurate statement of the philosophy which originally gave rise to the enforcement of fair procedure. In the first instance fair procedure was imposed as being a self-evident requirement imposed by "natural law". Willes J. reflected this view in 1863:

> [A] tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that is a rule of universal application, and founded upon the plainest principles of justice.(19)

Similarly, in Dr. Bentley's case(20) Fortescue J. attributed the rules of fair procedure to natural law and in the seventeenth Century it was thought that the requirement was so fundamental that even the enactments of Parliament itself could be struck down if infringing upon it.(21)

It is because of its originally close links with concepts of natural law that the Anglo-Canadian equivalent of "due process" has come to be known as "natural justice". The term itself has been severely criticized(22) and, despite its historically pure pedigree, it is an unfortunate term when applied to the modern judicial concept of fair procedure. It is misleading in the extreme both in that it suggests that the rules are concerned with substantive justice(23) and in that it suggests that the requirements are at once apparent.

Neither conclusion is correct. As interpreted by the Courts at the present time "natural justice" involves two principles: "that an adjudicator be disinterested and unbiased (nemo judex in causa sua) and that the parties be given adequate notice and opportunity to be heard (audi alteram partem)".(24) Maugham J. called these "more or less artificial principles"(25) and, far from giving rise to self-evident rules of procedure, "[i]t is not possible to produce an exhaustive list of the rules of natural justice.... or of the requirements of the rules...."(26) It has been said that the phrase "natural justice" has "little meaning, and that little misleading".(27) In a recent case the term was compared unfavourably with the increasingly popular term "fairness":

> The suitability of the term "fairness" in such cases is increased by the curiosities of the expression "natural justice". Justice is far from being a "natural" concept. The closer one gets to a state of nature the less justice does one find. Justice, and with it "natural justice", is in truth an elaborate and artificial product of civilisation which varies with different civilisations....(28)

Because of the ambiguities and inaccurate implications associated with the term it would be better if an expression such as "the requirements of fair procedure" were used to refer to the rule against bias and audi alteram partem.(29) The Courts themselves have recently begun to refer to the requirements of "fairness" in situations closely similar to those in which "natural justice" has been held applicable throughout most of this century. It is however a moot point whether this term is used as a mere synonym for natural justice or as a label for a newly developing concept. The result has been considerable confusion throughout the Commonwealth as to the applicability and content of nemo judex in re sua and audi alteram partem.

(2) DEPARTURE FROM THE MODERN ORTHODOXY

Until 1964 there was reasonable certainty as to the law regarding procedural fairness.(30) The highest courts of the Commonwealth had adopted a uniform test to determine when the standards prescribed by natural justice were to apply(31), and while the content of that duty was variable(32) it is said that there were sufficient guidelines available to permit lawyers to advise their clients with considerable accuracy as to the procedural standards natural justice would impose upon them.(33)

The then prevalent test of the applicability of natural justice was based on certain dicta of Atkin L.J. (as he then was) in R. v. ELECTRICITY COMMISSIONERS(34):

> Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially in excess of their legal authority, they are subject to the controlling jurisdiction of the Kings Bench Division....

In R. v. LEGISLATIVE COMMITTEE OF THE CHURCH ASSEMBLY(35) Lord Hewart(36) interpreted this passage as meaning that over and above having legal authority to affect rights, a body must have the "super-added quality" of being under a duty to act judicially(37). This test, and Lord Hewart's interpretation of it was adopted by the Judicial Committee of the Privy Council(38), the Supreme Court of Canada(39), and the New Zealand Supreme Court(40).

Thus, Dr. Mathieson paints a portrait of the pre-1960 law regarding procedural fairness as being relatively certain as to when the principles were to apply:

> [B]y 1960 it could at least be said that it was settled law that there must exist a duty to act judicially before it became relevant to inquire whether, on the facts, a failure of natural justice had occurred; and the criteria(41) for deciding the presence or absence of that duty were sufficiently clear to enable a lawyer to advise with some confidence in the majority of cases, and to know under what headings to address argument in the remainder.(42)

This apparent certainty of the law was however severely shaken by a House of Lords decision in 1964(43) and the interpretation of some dicta contained therein(44) by the English Court of Appeal in subsequent cases.(45) The radical nature of the change of course begun by the House of Lords is best indicated by the statement of Lord Denning M.R. that:

> At one time it was said that the principles (of natural justice) only apply to judical proceedings and not to administrative proceedings. That heresy was scotched in RIDGE v. BALDWIN.

Thus, if Lord Denning's interpretation of RIDGE v. BALDWIN is correct(46) the entire theoretical underpinnings of natural justice as accepted by the Courts of the Commonwealth in the 1950's were unceremoniously removed by the House of Lords in that one fateful decision.

It is submitted that the effect of RIDGE v. BALDWIN and those cases which have followed from it has been to restore the principles of "fair procedure" once again to the position of prominence which they held before the ELECTRICITY COMMISSIONERS(47) case. It is the object of this thesis to outline and defend a fresh approach to natural justice which reflects and fully takes account of the major English decisions since 1964. In the next section this new approach is briefly outlined. Subsequent chapters will deal with major issues arising from this brief statement and the assumptions that are inherent to it.

(3) NATURAL JUSTICE: A MODERN SYNTHESIS

The approach to procedural fairness which provides the best fit with the post - RIDGE v. BALDWIN cases is to consider it as a common law principle not dissimilar to the principle that the Courts will not write or re-write the terms of a contract that is validly made. Just as that simple contract principle is fundamental to all business agreements so too the principle of fairness is fundamental to all exercises of power over the lives or property of another.

It is a common law principle of the most fundamental nature, and the requirement of fair procedure does not rest on the ability of the courts to "imply" this limitation on the exercise of power into any contract or governing statute. Nor does it depend upon classification of the function of the body concerned as judicial or "quasi-judicial". Just as the common law must be looked to when there is uncertainty as to the provisions of any codification of the law, so too it is the common law that governs in the area of procedural fairness unless there are express terms to the contrary. Indeed, so fundamental is the concept of fairness that even express contractual provisions excluding nemo judex or audi alteram may be struck down by the Courts as contrary to public policy.(48)

However, just as the broad statement of the principle of freedom of contract must be adapted in particular circumstances, so too there are means by which failure to comply with the broadly stated rule of natural justice may be excused. There are two main ways in which this may be done:

(1) by express statutory provisions(49)

(2) by public policy considerations(50)

It must be conceded at the outset that most academic discussion has not viewed the requirements of fair procedure in this way. The more usual approach has been to seek out particular situations in which natural justice applies. Jackson, who perhaps comes nearest to the mark, allows that "there is at present almost a presumption that natural justice applies to all decision - making" (51) but then proceeds to a discussion of factors which "attract" the principles of natural justice. The better approach is to regard the requirements of procedural fairness as being of universal applicability, but with a variable content.

An analogy may perhaps be drawn with Crown Privilege.(52) Just as in privilege cases the onus is now on the party claiming the privilege to show why a particular document should not be released,(53) so too in natural justice, the tribunal concerned now has to justify to the Court why the procedural rules should not apply to their full effect. Similarly in both Crown Privilege and natural justice the issue is one of fairness and the object of the Courts is to ensure that the standards attained are as fair as reasonably possible.

In natural justice cases the obligation is to be as fair as possible without causing undue hinderance to the efficiency of the tribunal (whether it be statutory or domestic). The cases simply say that there is a prima facie duty to comply fully with nemo judex in re sua and audi alteram partem, but that - as a matter of public policy - an argument of "administrative convenience" will be permitted. The more serious the interests at stake however the heavier the burden of proof on the party attempting to establish that he is an exception to the full rigour of the common law.(54)

Just as Lord Reid proposed a "balancing test" between the two types of public interest in relation to Crown Privilege (55) so too it is necessary to balance the public interest in efficient administration against the public and individual interest that justice be done.

(4) SUMMARY

There are two main components of this approach to procedural fairness:

(1) that natural justice is of universal applicability and is neither limited only to those functions which may be characterized as judicial or quasi-judicial nor to those powers where it can be said that the requirement of fair play can be implied from statute or contract.

(2) the content of the duty is variable according to a test which seeks to balance administrative efficiency against the need that justice be done.

In establishing either of these points it will be necessary to analyse many of the post-RIDGE v. BALDWIN cases dealing with fair procedure. It is an assumption inherent to this analysis that the cases which use the term "fairness" are but applying natural justice under a different name. It has, however, been argued in some quarters that natural justice and fairness are separate concepts and must be kept quite distinct. The arguments on both sides of this issue must therefore be evaluated before the questions of the supervisory jurisdiction of the courts and the operation of the balancing test (or the content of fair procedure) can be more fully dealt with.

Even if it is granted that the overview of natural justice presented above is correct it will be but little consolation to the plaintiff who has suffered procedural injustice before a tribunal which is functionally categorized as "adminstrative" to be told that he was entitled to a fair hearing by a disinterested judge if he is then informed that remedy by way of prerogative writ is not open to him. Yet, there is considerable weight of authority suggesting that the writs of certiorari and prohibition are available only when the function complained of is "judicial" or "quasi-judicial". It is true that other remedies may in some circumstances serve the plaintiff equally well, but there are clearly occasions when these are the only remedies which will do. If this is so, the result may well be that the broadening of the supervisory jurisdiction of the Courts as regards procedural fairness has raised the spectre of a right without a remedy. Such possibility is abhorent to the very nature of law and it will be necessary therefore to consider the remedies available for breach of natural justice.

Finally, having established the current state of the law, it must be determined whether this accords with true public policy. Does the net now spread too widely,(56) or has the standard of fair procedure required been diluted to the point where it is too often mere sham, a shadow without substance?(57)

This thesis will be concerned with examining the issues raised by the short account of procedural fairness outlined above, and to answering the questions arising from it. Specifically, the following five main topics will be investigated:

(1) the proper interpretation of the "fairness" cases;

(2) the extent of the supervisory jurisdiction of the Courts;

(3) determination of the content of fair procedure;

(4) the availability of the prerogative remedies;

(5) the utility of the post-RIDGE v. BALDWIN approach from a public policy viewpoint.

FOOTNOTES - CHAPTER I

(1) "The New Despotism", Lord Hewart C.J., 1929, Ernest Benn Limited, at pp. 44-45.

(2) 1979, Butterworths.

(3) IBID p. 61.

(4) e.g. see ABBOT v. SULLIVAN [1952] 1 K.B. 189.

(5) e.g. HARELKIN v. UNIVERSITY OF SASKATCHEWAN 26 N.R. 364.

(6) e.g. McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211

(7) e.g. RINGROSE v. COLLEGE OF PHYSICANS & SURGEONS [1978] 8 A.R. 113.

(8) "The Discipline of Law", supra, p. 61.

(9) And also, it must be noted, the constitutions of those Commonwealth countries which have adopted the English form of government without complete codification.

(10) see generally Dicey, "Law of the Constitution".

(11) "The New Despotism" supra, note 1 at p. 24.

(12) An example of a body apart from the ordinary courts which affect property rights is the Land Use Appeal Board; the National Parole Board has substantial control over a person's body.

(13) see for example "Administrative Procedures", 1974, by Gabrielle Ganz (Sweet and Maxwell); "Tribunals and Government", 1974, By J.A. Farmer (Weidenfeld and Nicolson).

(14) see the comments of Megarry V.C. in McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211 at 223g for an example of judicial recognition of this factor in the context of a non-statutory regulatory body.

(15) Lord Hewart, op. cit.

(16) "Legal Control of Government" by B. Schwartz and H.W.R. Wade, 1972, Clarendon Press Oxford, at p. 241. The conclusion drawn as to the role of judges is not, however, one about which there is unanimity. See generally Ganz op. cit. (fn13), esp. Chapter 7. At page 1 Ganz argues: "The greatest disservice that administrative lawyers can render administrative law is to mould the administrative process in their own image. The rules of natural justice have a great

deal to answer for in this respect. They are modelled on the gladitorial combat between two parties before an impartial judge. Recent developments in the realm of administrative procedure have shown a marked trend away from the adversary process." Amongst these new developments Ganz cites conciliation and "informal" procedures as being inappropriate areas for judicial enforcement of natural justice. "But the most important development has been the recognition that an administrative decision is not a narrow contest between two parties but a determination of what ought to be done in the public interest in a particular case. This had led to the decision-maker taking a more active part than the courts in the gathering of material on which to reach a decision and also to a wider participation before the decision by persons who are not immediate parties to the dispute."

(17) see Wade 85 L.Q.R. 468.

(18) see discussion infra.

(19) in COOPER v. WANDSWORTH BOARD OF WORKS [1863] 14 C.B. (N.S.) 180 at 190.

(20) R. v. CHANCELLOR OF THE UNIVERSITY OF CAMBRIDGE [1723] 1 Str. 557 at 567: "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence."

(21) In DR. BONHAM'S CASE [1610], 8 Co. Rep. 113b at 118a, Coke said that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

This view was supported by Holt C.J. in CITY OF LONDON v. WOOD [1725] 12 Mod. 669 at 687: "And what my Lord Coke says in Dr. Bonham's case in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person shall be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, or between the Government and the party...."

(21) DAY v. SA ADGE [1614] H.o.6 85, 87 says that Parliament cannot legislate so as to violate the basic principles of a fair hearing 'TURA NATURAE SUNT IMMUTABILIA'.

(22) In LOCAL GOVERNMENT BOARD v. ARLIDGE [1951] A.C. 120 at 138 Lord Shaw of Dunfermline said: "In so far as the term 'natural justice' means that the result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is used for other purposes, it is vacuous".

(23) In fact, it is fundamental to the supervisory jurisdiction of the courts by way of review that they will not look to the result in any given case (which is for the tribunal itself to determine) but only to the procedure by which it was reached. see comments of Gale J. in POSLUNS v. T.S.E. [1966] 1 O.R. 285.

(24) de Smith, "Judicial Review of Administrative Action" (Stevens) 1973 (3rd ed.) at p. 134.

(25) in MACLEAN v. WORKERS UNION [1929] A.E.R. 468 at 472.

(26) Paul Jackson, "NATURAL JUSTICE" (2nd ed. 1979) p. 6 Sweet and Maxwell.

(27) This appears to be the view of Maugham J. in MACLEAN v. WORKERS UNION [1929] A.E.R. 468 at 472. It is also the approach of H.W.R. Wade 85 L.Q.R. 1969 468.

(28) McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211 at 219 per Megarry J.

(29) Nonetheless, at least one writer has provided an eloquent defence of the term. De Smith writes:

> "the term expresses the close relationship between the common law and moral principles, and it has an impressive ancestory. That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Senecas *Medea*, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth century judge to the events in the Garden of Eden. The historical and philosophical foundations of the English concept of 'natural' justice may be insecure, it is not the less worthy of preservation." ("Judicial Review of Administrative Action", 3rd Edition, Stevens 1973, pp. 135-136.)

(30) Which is not to be taken as saying that there was any degree of certainty at all as regards the application of that law of the particular facts of any given case.
Nakkuda Ali (P.C.) [1951] A.C. 66.
PROVINCE OF BOMBAY v. ADVANI (India) A.I.R. [1950] S.C. 222.

(31) LOW v. EARTHQUAKE (N.Z.) [1959] N.Z.L.R. 1198.
Copithorne (Canada S.C.) [1958] 16 D.L.R. 2d 241.

(32) de Smith, first edition, 1959, p. 109.

(33) see Mathieson 1974 N.Z.L.J. p. 227, esp. at pp. 282-283. The accuracy of this statement is, however, open to doubt. See the discussion infra.

(34) [1924] 1 K.B. 171 at 205.

(35) [1928] 1 K.B. 411 at 415.

(36) Lord Hewart was no friend of a then-expanding bureaucracy: see "The New Despotism" by Lord Hewart, 1929, which offers a "note of warning" on the "pretensions and encroachments of bureaucracy". (p.v.).

(37) per Lord Hewart in E.X. P. HAYNES-SMITH, "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has a duty to act judicially".

(38) Nakkuda Ali.

(39) Copithorne.

(40) LOW v. EARTHQUAKE.

(41) Based on Nakkuda Ali, these criteria appear to have been:
- (a) wether the body was deciding a question;
- (b) whether it was a right or a pr-vilege which was being affected;
- (c) the procedure laid down by the regulation;
- (d) the presence or absence of a lis inter partes.

(42) 1974 N.Z.L.J. p. 227 at 278.

(43) RIDGE v. BALDWIN [1964] A.C. 40.

(44) particularly in the judgment of Lord Reid.

(45) in R. v. GAMING BOARD OF GREAT BRITAIN, EX. P. BENAIM AND KHAIDA [1970] 2 Q.B. 417 at 533.

(46) This has been questionned. See Mathieson [1974] N.Z.L.J. 277 at 279. The Indian Courts were, however, quick to adopt the new view. ASSOCIATED CEMENT COMPANIES v. P. N. SHARMA, A.I.R. [1965] S.C. 1595. In India, "the duty to 'act judicially' need no longer be superadded to the duty to decide...." (Suranjan Chakraverti in his preface to the second edition of his "Natural Justice" Eastern Book Company, 1967).

(47) ELECTRICITY COMMISSIONERS (supra). Just 12 years previous to this Lord Loreburn had said that to "act in good faith and fairly listen to both sides.... is a duty lying upon everyone who decides anything". (BOARD OF EDUCATION v. RICE [1911] A.C. 179 at 182).

(48) e.g. ABBOTT v. SULLIVAN [1952] 1 K.B. 189; EDWARDS v. SOGAT [1971] Ch. 345; ENDERBY TOWN FOOTBALL CLUB v. F.A. [1971] Ch. 591.

(49) Carrying the contract analogy further, we may note how consumer protection legislation such as the English Unfair Contract Terms Act 1977 has modified the common law approach in particular situations.

(50) With regard to procedural fairness this usually amounts to an administrative efficiency argument (see discussion infra.). An analogy may perhaps be drawn with the policy of non-enforcement of illegal or immoral contracts and with the approach the Courts take to contracts concluded where there is gross inequality of bargaining power.

(51) "Natural Justice", 1973 p. 34 (Sweet and Maxwell).

(52) Or, more appropriately, "Public Interest" privilege.

(53) CONWAY v. RIMMER [1968] A.C. 910.

(54) MCINNES v. ONSLOW FANE [1978] 3 A.E.R. 211, discussed infra., and Lord Upjohn in DURAYAPPAH v. FERNANDO [1967] 2 A.C. 337 at 349 would seem to support this view. This statement is not in conflict with Reid and David's view (based on R. v. SCHIFF; ex. p. Trustees of Ottawa Civic Hospital [1970] 1 O.R. 752; 13 D.L.R. (3rd.) 304 (C.A.)) that "the onus rests with the person alleging denial of natural justice to show this by unequivocal proof". ("Administrative Law & Practice", 2nd ed., 1978, p. 218.) It is my view that, once it is shown that there has been failure to comply with the appropriate measure of natural justice, such failure will only very rarely be excused.

(56) Mathieson's view 1974 N.Z.L.J. p. 277.

(57) per Sidney Smith J.A., in KUZYCH v. WHITE [1950] 4 O.L.R. 187 at 197.

CHAPTER II - THE DOCTRINE OF FAIRNESS

INTRODUCTION

> [I]t is arguable that the notion of "fairness" may be a distinct concept from that of natural justice.... Such a twofold distinction has little to be said for it, doing nothing to solve the difficulties of defining "judicial" and "quasi-judicial", little or nothing to extend the boundaries of natural justice and adding new uncertainties....
>
> -Paul Jackson, 1973(1)

Until 1967 it could be said with certainty that the legally imposed requirements of fair procedure and the rules of natural justice were one and the same thing: there could be no judicial review of the procedures used by decision makers save to ensure compliance with procedural provisions of statute or contract or by way of natural justice. In that year, however, Lord Parker C.J. of the English Queen's Bench Division handed down a judgment(2) which introduced a new term to Commonwealth jurisprudence and, possibly, a new concept. The term was simply "fairness" or "a duty to act fairly".

The factual situation giving rise to litigation in that case was relatively straight-forward. Abdul Rehman Khan, a native of Pakistan who was resident in the United Kingdom, sought to bring his son into the country under s2(2) of the COMMONWEALTH IMMIGRANTS ACT 1962 which gave a right of entry to "any person who satisfies an immigration officer that he.... (b) is the....child under 16 years of age, of a Commonwealth citizen who is resident in the United Kingdom". Immigration officials at Heathrow Airport refused entry on the grounds that they believed the boy to be older than 16. On an application for habeas corpus and certiorari to quash the decision to refuse admission Lord Parker expressed the opinion that the immigration officers were most probably not "acting in a judicial or quasi-judicial capacity as those terms are generally understood".(3) That, however, was not the end of the matter, for his Lordship continued:

> I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest and bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.(4)

The English Courts were quick to adopt this new term and to use it as a mechanism by which to review the procedures of decision-making bodies which they felt they could not classify as judicial or quasi-judicial. By 1975 Mullan was able to count "eighteen, more or less, reported English decisions which have recognized in some form or other the theory of procedural fairness".(5) In Canada adoption of a doctrine of fairness has been slower, less certain, and it was not until 1978 that the Supreme Court of Canada unequivically expressed its approval of the doctrine. In

RE NICHOLSON AND HALIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE(6) Laskin, C.J.C., speaking for a bare majority of the Court, said that he accepted

> as a common law principle what Megarry, J., accepted in BATES v. LORD HAILSHAM OF ST. MARYLEBONE, (1972) 1 W.L.R. 1373 at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".(7)

This definite Canadian acceptance of the term was, however, presaged in the Supreme Court of Canada in ROPER v. EXECUTIVE COMMITTE OF THE MEDICAL BOARD OF THE ROYAL VICTORIA HOSPITAL,(8) MITCHELL v. R.,(9) and MINISTER OF MANPOWER AND IMMIGRATION v. HARDAYAL.(10) It was confirmed as a principle of common law generally binding throughout Canada by the Alberta Court of Appeal in HARVIE & GLENBOW RANCHING v. CALGARY REGIONAL PLANNING COMMISSION (1978)(11) and more explicitly by Laycraft J. of the Alberta Supreme Court Trial Division in McCARTHY v. BOARD OF TRUSTEES OF THE CALGARY ROMAN CATHOLIC SEPARATE SCHOOL DISTRICT NO. 1 (1979).(12) The Supreme Court of Canada has since confirmed its commitment to the "doctrine of fairness" in MARTINEAU v. MATSQUI INSTITUTION DISCIPLINARY BOARD (No. 2).(13)

In all of the Canadian cases in which the idea of a duty to act fairly has been invoked the courts have relied heavily on recent English decisions and on the views expressed by the more emminent British academic writers. The English cases have thus been incorporated into Canadian law by reference: there has been a general "recognition and adoption.... of the change of the law in England which was signalled by the decision in RIDGE v. BALDWIN".(14)

The effect of this change has certainly been to extend the supervisory jurisdiction of the courts into areas which the judges do not feel can be characterized as "judicial".(15) So much so, that it has been said that there is now "a general principle of law that persons who have to make decisions and form an opinion must act fairly and ought to give those who would be adversely affected an opportunity to be heard".(16)

The question arises, however, as to whether the "duty to act fairly" is the same in all other respects as the older "duty to act judicially". It is unfortunate that the issue has not been authoritatively settled in the courts. While it is true that there is considerable weight of authority in favour of the view that natural justice is indeed merely "a pretentious name for fairness" (17) it cannot be said with certainty that the Canadian courts have resolutely put any idea of distinguishing the two behind them.

If the courts finally adopt the view that fairness is a distinct concept much of the value of the introduction of that term will be lost. The predominant academic view of "fairness" has been that it is simply a device by which the courts have sought to escape the constraints of a classificatory approach to fair procedure.(18) If, however, it is sought to distinguish "fairness" from "natural justice" the result will be quite the opposite: "Indeed, it could lead to an additional classification decision having to be made by the courts...."(19) The result will be that not only will it be necessary to distinguish judicial from administrative bodies, but it may be necessary to distinguish "purely administrative" from simply "administrative" functions, "fairness" applying to the latter but not to the former. Canadian jurisprudence may yet be subjected to the introduction of the term "quasi-administrative" to supplement the plethora of categories already available: judicial, quasi-judicial, administrative, executive and ministerial.

While the English judges have not been hesitant to express their views on this question, there is evidence of considerable judicial equivocation in Canada. There is no Canadian judicial statement of high (and unquestionned) authority clearly stating that "[n]atural justice is but fairness writ large and juridically".(20) The Canadian case containing the clearest statement on this issue is MARTINEAU v. MATSQUI INSTITUTION DEISCIPLINARY BOARD (#2) 1979,(21) where Dickson J. says that "[i]n general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldly conceptual framework". Again, Dickson asserts that it is wrong "to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each...."

It is unfortunate, however, that Dickson J. was unable to carry the rest of the Court with him, only Chief Justice Laskin and McIntyre J. concurring with his reasons. Although agreeing in the result, the judgment of the majority in MARTINEAU did not go as far as Dickson in assimilating fairness with natural justice. It is indeed possible to read the judgment of Pigeon J. (concurred in by Martland, Ritchie, Beetz, Estey, and Pratte J.J.) as being consistent with the Dickson view. There are, however, dicta which -on their face value at any rate- suggest that the two may not be coterminous. In the first place, Pigeon J. bases his judgment on the proposition of Megarry, J. "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".(22) Secondly, Pigeon interprets the decision of the Supreme Court in NICHOLSON(23) as holding that even though on the facts of that case there was no duty to act in accordance with the principles of natural justice, "there was a common law duty to act fairly which fell short of a duty to act quasi-judicially but nevertheless could be enforced by judicial review". (The emphasis is mine.) Both of these statements seem to indicate that the majority takes a view which is markedly different from that of Dickson J. Unlike Dickson, however, they did not directly set out to answer the question of whether or not the two terms refer to distinct concepts. It is entirely possible that they would have expressed themselves differently had they set out with this in mind. That being the case, it cannot be said with any degree of certainty that MARTINEAU (#2) is authority either for or against the assimilation of fairness with natural justice.

Unless and until there is a majority judgment of the Supreme Court which deals directly with this issue it will be necessary to look to the results of the "fairness" cases in order to determine whether this is in fact a new concpet. It is the purpose of this Chapter to demonstrate that there is no valid logical hasis for such a distinction. Four main differences have been suggested, and it is proposed to deal with each in turn. Subsequent sections of this Chapter will deal with each of the following alleged differences:

(1) that a duty to be fair arises in light of criteria which are different from those giving rise to a duty to act in accordance with natural justice;

(2) that natural justice adheres to the power as a whole whereas fairness can attach to a particular exercise of the power.

(3) that fairness has a lesser content than natural justice; and,

(4) that breach of fairness gives rise to different remedies and consequences than breach of natural justice.

(1) CRITERIA GIVING RISE TO A DUTY TO ACT FAIRLY

One factor alleged to distinguish fairness from natural justice is with regard to the criteria giving rise to the duty to act fairly/judicially. It must be admitted at the outset that there is high judicial authority in Canada to the effect that, while a duty of fairness may arise wherever "rights" are affected something more is needed before there can be said to be a duty to act judicially.

Dicta to this effect must, however, be assessed in the light of the type of case in which they arise. It is submitted that the term "a duty to act judicially" has both a general and a specific meaning in Canadian jurisprudence. Used generally the term carries a meaning similar to that attributed to it by

Lord Reid in RIDGE v. BALDWIN. It means simply that a power which has been exercised or is being exercised is capable of affecting individual rights. Where the term is used in the context of an application in the nature of appeal to the Federal Court of Appeal under s.28 of the FEDERAL COURT ACT however it means something much more.

The distinction arises because it is thought that in enacting the FEDERAL COURT ACT the legislature intended to "freeze" the substantive law at the stage it had reached in 1970. The judicial interpretations of sections 18 and 28 are discussed below and it is not proposed to consider this anomalous area here.

For the present an effort will be made to escape the shackles imposed by language and to look at the issues involved where the term "a duty to act judicially" is used in its general sense.

(i) THE NADIR:- NAKKUDA ALI AND COPITHORNE

The present meaning of the term must be distinguished from that attributed to it in NAKKUDA ALI and those cases which followed on it. It's old meaning (which remains in use within the context of s.28 of the FEDERAL COURT ACT) was explained by Martland J. for the Supreme Court of Canada in CALGARY POWER v. COPITHORNE:

> the respondent submitted that a function is of a judicial or quasi-judicial character when the exercise of it affects the extinguishment or modification of private rights or interests in favour of another person, unless a contrary intent clearly appears from the statute. This proposition, it appears to me, goes too far in seeking to define functions of a judicial or quasi-judicial character.

> In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially.(24)

His Lordship expressly adopted the formulation of Lord Hewart C.J. in R. v. LEGISLATIVE COMMITTEE OF THE CHURCH ASSEMBLY, ex p. HAYNES-SMITH:

> In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.(25)

Exactly what the "super-added" test required was never fully clarified. A number of cases have suggested various criteria over and above "having the power to affect the rights of subjects". Thus, it has been suggested that a lis inter partes is necessary, that a judicial characterization is incompatible with a discretionary power, that there must be a necessity of investigation, and that the decision must be final and conclusive. It has even been said that a power cannot be judicial unless it must be exercised after following a prescribed procedure analogous to that of a court of law. On the whole, however, judges adopting the "super-added characteristic" approach have expressed themselves with more clarity in rejection of the "rights alone" definition than in spelling out the requirements that they believed to be necessary.

No adequate definition of a "duty to act judicially" under the supra-added test has ever been provided. Mullan has emphasized the difficulty of distinguishing "judicial" from "administrative" functions on this basis:

> Obviously the line between one class of function and the other is blurred, and generally the courts have not performed adequately in setting up criteria by which they can be distinguished. Indeed, one can ask whether any attempt at distinction is worthwhile. The mere fact that the distinctions are so difficult to draw suggests that there is something inherently unsatisfactory in saying that any demand for the application of the rules of natural justice or procedural fairness should depend upon such a distinction.(26)

In VOYAGEUR EXPLORATIONS LTD. v. ONTARIO SECURITIES COMMISSION Pennell J. emphasized the difficulties with a literary flourish in asserting that "the test to distinguish between an administrative act and a judicial or quasi-judicial act is almost as elusive as the Scarlet Pimpernel".(27)

(ii) ENGLISH REJECTION OF NAKKUDA ALI

Such imprecission in the definition of the words which were the hinge upon which a right to procedural fair play turned could not be allowed to continue long. The "super-added" test was challenged in England in 1963 (just five years after its adoption in Canada) and was disapproved by the House of Lords. Lord Reid took the view that "a power to determine and decide.... carries with it, of necessity, the duty to act judicially" (28) and in effect over-ruled the ex p. HAYNES-SMITH and NAKKUDDA ALI approach, saying that it was inconsistent with a number of earlier cases.(29) His Lordship adopted the view of Bankes L.J. in R. v. ELECTRICITY COMMISSIONERS that the judicial element was inferred from the nature of the power: ".... powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially, and not ministerially or merely as.... proceedings towards legislation".(30)

Thus, in England the term "judicial" is now treated as a mere term of art in respect of natural justice. It means only that the decision must be capable of affecting the rights of others. Professor Wade has expressed it like this:

> The mere fact that a power affects rights is what makes it "judicial", and so subject to the procedure required by natural justice. In other words, a power which affects rights must be exercised "judicially", i.e. fairly, and the fact that the power is administrative does not make it any the less "judicial" for this purpose.(31)

(iii) A TORTUOUS TALE

The story of the Canadian use of the term is, however, long drawn out and somewhat unfortunate. A brief outline of its history contains many of the elements of a good farce, it being regrettable only that the procedural rights of individuals subject to the exercise of administrative power has been made to turn upon the formulations variously accepted by our courts.

If one begins with the assumption that the formulation of Lord Reid in RIDGE v. BALDWIN is correct then a number of earlier Canadian decisions "got it right".(32) Two years after Nakkuda Ali was reported they were still on the right track. In L' ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. THE LABOUR RELATIONS BOARD OF QUEBEC the Supreme Court of Canada demonstrated an understanding of the law regarding natural justice equal to that of the members sitting in RIDGE v. BALDWIN. Rand J.'s formulation was as accurate as could be hoped for:

> [I]n this sense we are too much the prisoners of words. In one sense of administration, in enactment of subordinate legislation or quasi-legislation, the principle has a limited application: but in the complexity of governmental activities today, a so-called administrative board may be charged not only with administrative and executive but also with judicial functions.... When of a judicial character, they affect the extinguishment or modification of private rights or interests.(33)

A scarce five years later, however, the Supreme Court of Canada adopted the "super-added" test in CALGARY POWER & HALMRAST v. COPITHORNE.(34) In the judgment for a unanimous court Mr. Justice Martland chose to follow a decision of the Privy Council on appeal from Ceylon(35) rather than a long line of Canadian authority - including decisions of the Supreme Court and the Privy Council - to the contrary effect. In particular, it is little short of incredible that his Lordship made no reference to the unanimous decision of his own Court in L'ALLIANCE; the more so as that case had been a basis for the decision of the Alberta Court below.(36)

The capacity of the Supreme Court to "overlook" its own previous decisions apparently knows no bounds. Thus, in GUAY v. LAFLEUR, decided seven years after COPITHORNE and twelve years after L'ALLIANCE (and, be it noted, a year after the reporting of RIDGE v. BALDWIN in England) we find Cartwright J. approving LAPOINTE and L'ALLIANCE and saying that

> [T]here are, of course, many administrative bodies which are bound by the maxim "audi alteram partem" but the condition of their being so bound is that they have power to give a decision which affects the rights of, or imposes liabilities upon, others.(37)

At no point in any of the judgments of the Supreme Court in this case was the COPITHORNE decision referred to. Just as Mr. Justice Martland appears to have suffered selective amnesia in COPITHORNE so too the Court appears to have forgotten MARLAND's judgment by the time GUAY v. LAFLEUR fell to be decided.

This was not, however, the final twist in the Canadian approach to the meaning of the term "judicial". For whatever reason, the view has developed that COPITHORNE is the leading case in the area. It has been cited as authorative in a large number of decisions until very recently.(38) Thus, to pick but one example, the Alberta Court of Appeal appears to have accepted COPITHORNE as binding with regard to the definition of "a duty to act judicially' in CAMPEAU CORPORATION v. THE COUNCIL OF THE CITY OF CALGARY.(39) It has been noted already that the COPITHORNE rule is still of unquestionable authority in the area of applications under s.28 of the FEDERAL COURT ACT.

(iv) RETURN TO L'ALLIANCE

A number of very recent decisions appear to indicate, however, that the Canadian courts are now committed once again to the formulation found in RIDGE v. BALDWIN and L'ALLIANCE where the term "duty to act judicially" is used in a general sense. It is hard to pin-point exactly when this change came about, but some slight indication of the new course the courts were to follow appears as early as 1975. In MITCHELL v. R.(40) the decision of a majority of the Supreme Court of Canada was based simply on the proposition that the power of decision in issue affected "privileges" only and not "rights".(41)

This is not in itself of much significance one way or another. What is important, however, is that the Court did not simply follow the route taken in COPITHORNE in order to hold that the "superadded" quality of judicialness was absent. That course was clearly open in MITCHELL's case for it, like COPITHORNE, involved the exercise of a statutory power which was exercisable by the sole authority of one person, with no lis inter partes (at least to the court's way of seeing things), and wherein a subjective assessment of public policy was crucial.(42) In COPITHORNE these factors were taken, collectively, to exclude a duty to act judicially(43) but in MITCHELL they are only mentioned as in support of the rights-privileges distinction.(44)

It is not proposed at this stage to consider the merits of attempting to distinguish "rights" from "privileges",(45) but only to note the hesitant step taken by the majority of the court toward the view of Lord Reid in RIDGE v. BALDWIN. The dissenting judges in MITCHELL's case were clearer still. Laskin C.J.C. openly expressed his approval of the L'ALLIANCE approach while Spence J. offered a statement of the law fully in accord with both the RIDGE and L'ALLIANCE views:

> [T]he decision of the Board was not merely of an administrative character but one which deprived him of very important personal rights. Surely there can be no doubt.... that the provisions of the CANADIAN BILL OF RIGHTS and the tenets of natural justice apply to such a dicision.(46)

Thus, it is possible to find in MITCHELL v. R. some indication of the changes which were to come. As is apparently their custom, however, the Supreme Court did not take the trouble to explain why they chose to follow a route different from that indicated by previous authority. They did not distinguish COPITHORNE; they did not over-rule it or explain it; they gave no reason or explanation as to why L'ALLIANCE was resurrected. Nevertheless, the judgments in MITCHELL and again in NICHOLSON cast grave doubt upon the authoritative value of COPITHORNE. It was not that the latter case was over-ruled, but a decision which is repeatedly ignored by the highest court in the land must be considered of doubtful authority.

The decisions of a braver court must therefore be looked to in order to find the first express judicial statement that COPITHORNE is no longer to be referred to in seeking a definition of the circumstances giving rise to a "duty to act judicially" in the general sense. Such a decision is that of the Alberta Court of Appeal in HARVIE & GLENBOW RANCHING v. CALGARY REGIONAL PLANNING COMMISSION, per Clement J.A. (for the Court):

> In some quarters it has been said that the subsequent reference by Martland J. (in COPITHORNE), to passages in the judgment of Lord Radcliffe in NAKKUDA ALI v. M.F. DeS JAYARATNE, (1951) A.C. 36, inhibits the development of the supervisory jurisdiction of Canadian Courts as compared with a broader view expressed later in RIDGE v. BALDWIN, and in which Lord Reid vigorously disagreed with the conclusion reached by Lord Radcliffe on the circumstances before him. I think that the judgment of the Supreme Court of Canada in NICHOLSON v. HALIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE, 23 N.R. 410, delivered October 3, 1978, which is to say since the argument in the present case, has dispelled that repressive view and I will say no more about it.(47)

It may be deduced from this that the Alberta Court of Appeal views Lord Reid's analysis as being generally authoritative in Canada: i.e., a duty to act judicially arises simply because a power is being exercised which is capable of affecting the rights of others. Further support for this approach is to be found in the judgment of Laycraft J. (as he then was) in McCARTHY v. BOARD OF TRUSTEES. The issue there was whether certiorari could issue to quash the decision of a baord which, under the COPITHORNE approach, would be deemed to be administrative. Certiorari, however, only applies to "judicial" bodies. Mr. Justice Laycraft took the issue directly in hand in adopting Professor Wade's view of the technical meaning of "judicial" and concluded that

> [t]he problem may be one of semantics. A statutory power of decision must be exercised lawfully. He who decides may be an administrator and he may be acting administratively; that does not prevent the conclusion that he is also acting judicially in the sense that his act is one subject to control by certiorari.(48)

It was not until the end of 1979, however, that a judge of the Supreme Court of Canada was as explicit on this subject. In MARTINEAU (#2) Dickson J.baldly asserts that "[t]his notion of a 'super-added duty to act judicially', as a separate and independent pre-condition to the availability of natural justice, and inferentially, to recourse to certiorari was unequivocally rejected by Lord Reid in RIDGE".(49) It must be conceded, however, that at no point in their judgments do the Supreme Court directly challenge or explain COPITHORNE. Nevertheless, Dickson quotes with approval the words of an academic commentator:

> Certainly in England and in most other parts of the Commonwealth, the requirement for review that the exercise of a statutory power must not only affect the rights of a subject, but also be subject to a super-added duty to act judicially, is now thoroughly discredited. In other words, the ratio of NAKKUDA ALI v. JAYARATNE in the Privy Council --and hence, one would have thought, of CALGARY POWER v. COPITHORNE in the Supreme Court of Canada-- is no longer good law.(50)

Although this is the only reference to COPITHORNE made by the Supreme Court justices surely there can now be no doubt that the decision is to be treated as over-ruled in cases where the term "a duty to act judicially" is used in a general sense.

The judgment of Mr. Justice Dickson in MARTINEAU (#2) is also important for a second reason. It is here that we find an express statement to the effect that dicta issued in the course of applications under s.28 of the FEDERAL COURT ACT are not to be considered as authoritative in other contexts. His Lordship said that decisions such as HOWARTH,(51) MARTINEAU (#1),(52) and COOPERS AND LYBRAND(53) must be interpreted as applying only in relation to s.28. That section has caused difficulties "because it tended to crystallize the law of judicial review at a time when significant changes were occurring in other countries with respect to the scope and grounds for review".(54) A joint reading of s.18 with s.28 should not be allowed to inhibit the development of the common law: "As I read the ACT, Parliament envisaged an extended scope for review. I am therefore averse to giving the Act a reading which would defeat that intention and posit a diminished scope for relief from the actions of federal tribunals".(55)

In the end he applied

> the principle laid down by Brett L.J. in R. v. LOCAL GOVERNMENT BOARD (1882-1883) 10 Q.B.D. 309, 321, that the jurisdiction of the court ought to be exercised widely when dealing with matters not strictly judicial(56) but in which the rights or interests of citizens are affected.(57)

In conclusion it is necessary to note only that in the case referred to Brett L.J. thought the decision in question to be "judicial", and that he drew this inference from the nature of the power itself.

(v) THE DUTY TO ACT FAIRLY

It is reasonably certain therefore that in Canada at the present time a duty to act judicially will be held to arise whenever there is "a power to determine and decide",(58) the exercise of which affects someones rights. No more is necessary. That is shown by the general acceptance in Canada of RIDGE v. BALDWIN.

It has also been clear for some time, however, that it is the potential to affect individual rights that brings a duty of fairness into play. Unanimous support for this proposition in the Supreme Court of Canada is to be found in MINISTER OF MANPOWER AND IMMIGRATION v. HARDAYAL(59) where, on a s.28 application the Court distinguished between a duty to act fairly and a duty to act judicially. The latter (in its specific sense) did not arise merely because rights were affected. Mr. Justice Spence (for the Court) felt that on its proper interpretation s.8 of the IMMIGRATION ACT "was intended to be purely administrative and not to be carried out in any judicial or quasi-judicial manner...."(60)

A duty of fairness did, however, lie upon the Minister:

> It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to do so might well give rise to a right of the person affected to take proceedings under s.18(a) of the FEDERAL COURT ACT.(61)

In NICHOLSON too, the majority of the Supreme Court of Canada inferred a duty to act fairly from the fact that a power was exercised which affected "rights" of the persons subject to it.

To labour the point, it is abundantly clear that a duty to act fairly and a duty to act judicially arise in light of the same criteria: the sole question in both cases is whether in its exercise the power affects individual rights. This is evident from the foregoing analysis. It is apparent too from the fact that - outside of the s.28 decisions - the courts themselves do not distinguish between "fairness" and "natural justice" cases when considering the criteria giving rise to audi alteram partem and nemo judex in re causa sua. Rather, they rely indiscriminately upon both types of cases in arriving at the conclusion that a "super-added" quality of judicialness is not necessary before a body is obliged to conform with those rules which have generally and historically been labelled "principles of natural justice".

(vi) ABUSE OF DURAYAPPAH

Before leaving the question of the criteria giving rise to a duty to act fairly/judicially, it is necessary to draw attention to the analysis of G.D.S. Taylor in his seminal article of 1977.(63) It is there suggested that the criteria giving rise to both duties are those indicated by the Privy Council in DURAYAPPAH v. FERNANDO.(64) The better view, however, is that the sole criteria is whether the power of decision affects the rights of others. The so-called "Durayappah factors" go to determining the content of the duty in any given case and not to the question of whether or not there is such a duty. While Dr. Taylor calls such an approach "unhelpful and positively misleading"(65) it is submitted that this is the only formulation which single-mindedly puts to one side any notion of classifying powers. It alone will ensure that the phoenix of the super-added test never again arises. This question will be discussed in greater detail in Chapter 3 and it is not proposed to consider the merits of each approach at this stage. It is sufficient for present purposes that the proposition that the Durayappah factors should be viewed as "criteria giving rise to" the duty of fairness is unequivocally rejected.

(2) "ADHERENCE TO A PARTICULAR EXERCISE"

The idea that natural justice can be distinguished from fairness in that the former attaches only to a power taken in toto and not to particular exercises of the power was proposed by Wooten J. in the New South Wales case of DUNLOP v. WOOLAHRA MUNICIPAL COUNCIL.(66) In that case it was held that in the exercise of town planning powers the Council was not bound by the rules of natural justice.(67) Nevertheless, Wooten believed that:

> the council is still bound to act fairly when exercising its powers, although it is not necessarily bound in all cases to give a hearing. Whereas the principles of natural justice would, if applicable, have required the council to give a hearing in all cases of the exercise of the power, the principle of fairness enables the merits of particular exercises of the power to be considered individually.(68)

Although Mr. Justice Wooten relied on a large number of English authorities in support, there is no decision of the English courts which expressly adopts this view.(69)

An essentially similar view of natural justice was, however, advanced by Jackett C.J. (with whom Pratte J.A. concurred) of the Canadian Federal Court of Appeal in HOWARTH v. NATIONAL PAROLE BOARD.(70) This case was subsequently appealed to the Supreme Court of Canada(71) and Jackett C.J.'s decision was upheld by a majority who did not discuss the point. The Act in question permitted the National Parole Board to revoke parole "upon completion" of "such enquiries in connection therewith as it considers necessary".(72) Howarth however sought to have the Court set aside the revocation of his parole under s.28 of the FEDERAL COURT ACT(73) which created "a new remedy equivalent to an appeal"(74) in relation to

> a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal....(75)

In his interpretation of this section Jackett proceeded very much on the basis that the Federal Court Act in essence codified the then-existing law on natural justice.(76) His comments thus reflect his views on the general law of fair procedure and are not to be construed narrowly as merely an interpretation of s.28.

The National Parole Board is not a body which his Lordship felt could be characterized as quasi-judicial (and, by implication, therefore, it is not a body which attracts the principles of natural justice). The reason is stated to be that no body can be said to be of a quasi-judicial nature unless "OF NECESSITY" it is required to give reasonable notice and a "fair opportunity to answer".(77) Jackett expressed the view that in normal circumstances the board should communicate "to the paroled inmate what has been said against him" and should give him "a reasonable opportunity to make his answer thereto".(78) This is not, however, a procedure that need always be followed for "there may be, and probably are, cases where that is not a possible course or where it is not wise to take that course".(79) Because of the possibility that cases may arise in which the particular power could be exercised without regard to the requirements of fair procedure his Lordship concludes that "it cannot be said that a revocation decision is 'required by law to be made on a judicial or quasi-judicial basis'".(80)

In the end, therefore, the majority of the Federal Court of Appeal appear to accept the proposition that natural justice adheres to the power as a whole and is incapable of attaching to individual exercises of a power. The authoritative value of

Jackett C.J.'s analysis is however doubtful. On appeal the Supreme Court upheld the decision of the Federal Court of Appeal.(81) Pigeon J., for the majority, based his decision almost entirely on the earlier case of EX. P. McCAUD(82) and did not specifically discuss the proposition adopted by Jackett. Apart from a brief re-assertion by the Majority of the "super-added test" as interpreted in CALGARY POWER v. COPITHORNE(83) the only discussion of what gives rise to a duty to act judicially is to be found in the dissenting judgment of Dickson J. wherein his Lordship adopts an approach very different from that of the Federal Court of Appeal. Indeed, it is quite the opposite. Dickson expressly says that the question "[w]hether or not such a duty to act judicially exists will depend upon the circumstances of the particular case...."(84)

The HOWARTH case thus leaves Canadian jurisprudence very uncertain with regard to the question of whether natural justice can be said to adhere to individual exercises of power. We are left with a statement of law expressed by the Federal Court of Appeal which is discordant with the views of a minority judge of the Supreme Court on an issue upon which the majority of that court did not see fit to comment.(85)

It is submitted, however, that the result of a large number of cases of hitherto undoubted authority establishes - at the very least - that it cannot be said with certainty that natural justice is incapable of adhering to individual exercises of a power. These cases deal with three main areas of the law: (i) the position of employees dismissable at pleasure; (ii) the position of aliens seeking citizenship; and (iii) the exercise of planning powers. To this list may possibly be added the position of persons applying for membership of trade or professional associations. It is proposed to discuss each in turn.

(i) EMPLOYEES DISMISSIBLE AT PLEASURE(86)

As a general proposition of law, employees dismissable at pleasure are not entitled to be heard before termination of their employment. This was reiterated by Lord Reid in RIDGE v. BALDWIN: "the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason".(87) Lord Reid's judgment in that case has been widely accepted by the Canadian courts as an accurate statement of the law to be followed in this country. The general rule was recently affirmed in Alberta by Laycraft J. who quoted Lord Reid and continued to say that in a case of a pure master-servant relationship "the board would be free to dismiss.... with or without reasons", subject only to the employee's right of action for damages for any breach of contract...."(88)

But this is not always the case. There is some authority -granted not of a conclusive nature- which suggests that a right to be heard may, in certain circumstances, arise even in a pure master-servant relationship. In McCARTHY v. BOARD OF TRUSTEES OF THE CALGARY ROMAN CATHOLIC SEPARATE SCHOOL DISTRICT (#1) Laycraft J. left open the question of whether there could be any relationships "in which all requirements of the observance of rules of natural justice are excluded"(89) and in RE NICHOLSON AND HALIMAND-NORFOLK

REGIONAL BOARD OF COMMISSIONERS OF POLICE a majority of the Canadian Supreme Court (obiter) expressed their disapproval of the strict common law rule.(90)

Thus, the prevailing judicial attitude in Canada appears to be one of reluctant recognition of a rule which is too well established in authority to ignore. It is, however, a rule which is only grudgingly followed. The courts have in the past sought to avoid the preclusion of natural justice by applying liberal definitions to the phrase "holder of an office" and restrictive definitions to the term "pure master-servant relationship". It is to be expected that, if it becomes necessary to achieve a result which is deemed desirable in a particular case, the judges will seek to utilize other devices to escape the full rigour of entrenched authority. In such a case it is likely therefore that the Canadian courts will show themselves amenable to a line of authority developed in the English Chancery Division which suggests that natural justice may adhere to a particular exercise of a power to dismiss at pleasure.

The 19th Century case of DEAN v. BENNETT(91) stands as possible authority for the proposition that, if in a case of dismissability at pleasure, "the decision-maker chooses to assign a reason and that reason involves a charge reflecting on the honesty or integrity of the employee, the latter is entitled to a hearing".(92) Although there is weighty English authority against such a proposition,(93) Megarry J. recently referred to this as a possible exception to the rule against a right to be heard in cases of dismissability at pleasure:

> The principles of natural justice, which apply where the rule is of the latter type (i.e. dismissable for cause), do not apply where it is of the former type (dismissable at pleasure), subject to the possible qualification that if the power is exercised on some stated ground which impeaches the character or conduct of the member and is intended as a penalty for it, he must be given notice and a hearing. It is conceivable that this qualification applies where the ground is not stated but is established by evidence aliunde.(94)

Thus, "[t]his may well represent a situation where natural justice adheres to the factual exercise of the power".(95) By itself, however, this is "too slight a basis upon which to build a theory".(96)

(ii) ADMISSION OF ALIENS TO CITIZENSHIP

Further evidence that the Dunlop thesis is untenable is, however, to be found in the case of the procedures governing admission of aliens to citizenship. The general assumption is that in this area, as in the area of master-servant relationships, there is no requirement of notice or hearing. Again however, the general assumption does not apply to each individual case involving exercise of the power.

Under the CANADIAN CITIZENSHIP ACT 1970(97) a citizenship court is established to determine certain matters which are prerequisite to the grant of that status. Even assuming, however, that the court determines all of the enumerated questions in the applicant's favour, a broad discretion remains in the Minister: "The Minister may, in his discretion, grant a certificate of citizenship to any person who is not a Canadian citizen and who makes application for that purpose and satisfied the Court...." on seven enumerated points.(98) This discretion arises whenever an application comes before the Minister; "it is unfettered in the sence that no specific directions are found in the statute as to the basis on which certificates are to be granted or refused to persons who have the prescribed qualifications. It would be difficult to conceive of a wider discretion...."(99)

The traditional and generally accepted view was expressed by ADDY J. in the Ontario High Court of Justice in DOWHOPOLUK v. MARTIN:

> It would be injurious to the public interest for Courts to embark upon inquiries as to whether a Minister of the Crown had properly exercised his discretion in an administrative matter and even more so in a matter which flows from royal prerogative, or for the Court, by any order or other process, to cause an inquiry to be opened up in this area....(100)

Nevertheless, in certain circumstances involving the exercise of this power, the Minister may be required to allow the applicant an opportunity to be heard. This is the effect of an unanimous decision of the Federal Court of Appeal in LAZAROV v. SECRETARY OF STATE OF CANADA. In that case Thurlow J., speaking for the Court, considered the particular circumstances to which natural justice might adhere:

> Leaving aside any question of declining the grant of certificates to particular classes of persons on grounds of broad general policy, which as I see it, it is not necessary to consider, it seems to me that whenever the reason for contemplating refusal of an application is one that is peculiar to the particular applicant the nature of citizenship and

> its importance to the individual are such that the applicant ought at least to have an opportunity of some kind and at some stage of the proceedings to dispute its existence.(101)

It should be noted that the decision in this case was based on the assumption that the principle referred to was a component part of natural justice. At no point did Mr. Justice Thurlow suggest that he was dealing with a different concept: the Federal Court of Appeal based its decision on natural justice cases and made only the most fleeting of reference to a "duty to act fairly".

Lazarov, therefore, stands as strong authority that - in Canada at any rate - natural justice is capable of adhering to individual exercises of a power.

(iii) TOWN PLANNING POWERS

Moreover, it is significant that even in the area of town planning powers - the very class of power under consideration in the Dunlop case - the Canadian courts have consistently acknowledged that natural justice may adhere to the factual exercise of a power to which it is not normally incidental. This was the holding of Hall J., speaking for a clear majority of the Supreme Court of Canada in WISWELL v. THE METROPOLITAN CORPORATION OF GREATER WINNIPEG.(102) In that case the court did not let the fact that the powers in question were legislative in nature prevent them from enforcing natural justice. Mr. Justice Hall adopted the words of Freedman J.A. in the court below and in so doing recognized that natural justice may adhere to particular exercises of a power:

> this was not a by-law of wide or general application, passed by the Metropolitan Council because of a conviction that the entire area had undergone a change in character and hence was in need of reclassification for zoning purposes. Rather it was a specific decision made upon a specific application concerned with a specific parcel of land....(103)

The decision moreover was said to be essentially dealing with a dispute between proponents and opponents of a change in the zoning of that specific piece of land. While the general power used by Council was legislative, the Court looked to the particular circumstances of its exercise in this case. It was held that "in truth the process in which it (the Council) was engaged was quasi-judicial in nature..."(104) and therefore subject to the supervisory jurisdiction of the Courts.

The Wiswell decision is extremely strong authority against the Dunlop hypothesis. The case is of unquestionnable authority in the area of town planning powers. It is supported by previous authority(105) and has been widely followed in subsequent cases.(106)

(iv) TRADE AND PROFESSIONAL SITUATIONS

In addition to the strong evidence against the DUNLOP-HOWARTH view in the areas of dismissability at pleasure, admission to citizenship, and town planning powers, some indication that natural justice may adhere to individual exercises of power is to be found in the area of application for admission to or licensing by bodies regulating (or controlling) employment in a particular field. The strongest evidence to this effect is perhaps to be found in Megarry V.C.'s decision in McINNES v. ONSLOW FANE.(107)

His Lordship there distinguished between application cases where the decision as to admission may be based on a broad policy consideration such as the need to limit numbers and expectation cases where no such policy considerations come into play. The power in both cases is the same: to admit or refuse admission. The application of natural justice, however, will vary with the particular circumstances.

This decision is similar in effect to the decision of the Canadian Supreme Court in ROPER v. EXECUTIVE COMMITTEE OF THE MEDICAL BOARD OF THE ROYAL VICTORIA HOSPITAL. It was there allowed that "on an exceptional basis only" natural justice may require the executive committee of a hospital to "hear the parties, and even their witnesses" before deciding not to engage a doctor who has applied for employment.(108)

It is not suggested that these cases in themselves are strong enough to defeat the distinction adopted by Jackett C.J. and Wooten J. Much less is it suggested that they necessarily establish a right to be heard in cases of application for membership of trade or professional associations, even where a refusal of admission is basedsolely on findings relating to the honesty or integrity of the individual. The ROPER decision in particular must be read as restricted very closely to the particular facts of the case. Nevertheless, McINNES and ROPER do reflect a general recognition by the courts of the principle that natural justice is capable of adhering to individual exercises of a power regarding which its content would, in the ordinary course of events, not be expected to involve more than a requirement of good faith.

(v) CONCLUSION

It is apparent from the foregoing that the view of natural justice adopted in DUNLOP and by the Federal Court of Appeal in HOWARTH is not supported by Canadian case law. Certainly it is true that the judgment of Jackett C.J. in the latter case and the ambiguity of the majority of the Supreme Court is a basis on which future courts could, if they so desired, fabricate a distinction of natural justice from fairness. So to do would, however, be to fly in the face of other authority. In a wide-ranging analysis carried out in 1977, G.D.S. Taylor concluded that in Australia "it is not absolutely clear that natural justice cannot adhere to individual exercises of a power".(109) It is submitted that in Canada in 1980 the position is much more certain than this: it is indeed absolutely clear that natural justice can so adhere. The DUNLOP-HOWARTH distinction being based on the contrary proposition,(110) it must be concluded that these cases were based on an inadequate understanding of natural justice.

(3) THE CONTENT OF "FAIRNESS"

The idea that the procedural requirements of a "duty to act fairly" are less than those of a "duty to act judicially" is one which as a superficial attraction and which appears to be supported in a number of cases. Thus, for example, in RE NICHOLSON Laskin C.J.C. refers to the "emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice"(111) and approves de Smith's assertion that "[i]n general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative".(112) Similarly, in MITCHELL v. R. Laskin appears to have accepted that fairness may involve something less than the procedural protection of natural justice: "I do not think it follows that a denial of judicial or quasi-judicial status to a tribunal relieves it from observance of some at least of the requirements of natural justice".(113) Again, in MINISTER OF MANPOWER & IMMIGRATION v. HARDAYAL Spence J. (for the Supreme Court of Canada) appears to accept that, while "in exercising.... an administrative power, the Minister is required to act fairly",(114) this involves something less than the "right of a fair hearing" that would be involved where there was a duty to act judicially(115) (i.e. in accordance with natural justice).

There are indications too that some at least of the English Law Lords have accepted that fairness and natural justice involve different procedural requirements. In PEARLBERG v. VARTY (INSPECTOR OF TAXES) Lord Pearson stated that a tribunal with judicial functions is required to apply the princples of natural justice "unless there is a (statutory) provision to the contrary". A lesser requirement of fair procedure is, however, imposed even on bodies which do not have the magical "judicial" quality:

> [W]here some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as "Parliament is not to be presumed to act unfairly", the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality

> of hearings or representations and counter-representations.(116)

Nevertheless, it is clearly wrong to think that natural justice itself requires "a plurality of hearings or representations". It is apparent that natural justice does not have a set and immutable content. This was the foundation of the decision of the English Court of Appeal in RUSSELL v. DUKE OF NORFOLK where Tucker L.J. recognized that domestic tribunals are not necessarily required to act in the same fashion as "local justices sitting as a court of law".(117) His Lordship was of the opinion that the requirements of natural justice must depend upon a number of factors, especially, "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth".(118)

A similar approach to natural justice was adopted by Gale J. in the Ontario case of POSLUNS v. TORONTO STOCK EXCHANGE.(119) After reviewing the authorities he concluded that "although the question of whether the principles of natural justice have been complied with in any one case is an issue of law, nevertheless, it rests in each instance on the particular facts".(120) Mr. Justice Gale's decision was subsequently approved on appeal to the Supreme Court of Canada(121) and must therefore be considered as authority that throughout the country natural justice is to be viewed as imposing varying procedural requirements depending on the particular fact situation.

Despite this admitted flexibility, however, there is a line of authority to the effect that there is a minimum content of natural justice to be met in all cases. This idea is to be found in a number of Canadian cases of early years. It makes its appearance in a judgment of the highest court in the land in LAPOINTE v. L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTREAL(122) where the Privy Council on appeal from Canada adopted the view of the Lord Chief Baron in WOOD v. WOAD. In that case it was said that, as the minimum acceptable procedural protection, "no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence".(123) This view was adopted and fleshed-out in BONANZA CREEK HYDRAULIC CONCESSION v. R. where Duff J., for a majority of the Supreme Court indicated that the minimum content of natural justice was notice of "what is alleged against him" and an opportunity to answer to it.(124)

Nor is the idea that natural justice as a minimum involves a requirement of notice and an opportunity to answer one that has been abandoned in more recent years. This view has been expressed in a number of cases right down to the present time. It was the basis of decision in the Supreme Court of Canada in L'ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. THE LABOUR RELATIONS BOARD OF QUEBEC(125) in 1953; it was adopted by Cartwright J. in 1965 in GUAY v. LAFLEUR,(126) applied and extended (to include a right tocouncil on the facts of the case) by Shannon J. in the 1974 decision of BACHINSKY & CANTELON v. SAWYER,(127) and reaffirmed by Dickson J. in HOWARTH v. N.P.B. the following year. Indeed, the idea that notice and hearing are an inseparable minimum content of natural justice was a secondary basis of

Lord Morris' strong dissent in MALLOCH v. ABERDEEN CORPORATION.(129)

It must be emphasized that in none of these cases is the suggestion made that natural justice of necessity involves a right to an oral hearing, a minimum period of time in which to prepare one's case, a required degree of speficicity in the notice of the case to be met, a right to counsel, or any of the number of other things that have from time to time been said by their absence to distinguish the fairness cases from natural justice.(130) Moreover, it is not altogether without significance that in several cases the minimum content of fairness has been described in language strongly reminiscient of that of Duff J. in BONANZA CREEK(131) Thus, for example, in NICHOLSON(132) the Chief Justice adopts a view of the minimum content of fairness as expressed by Lord Denning in SELVARAJAN v. RACE RELATIONS BOARD:

> that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.(133)

As in natural justice cases the "fundamental rule" is said to involve notice of the case to be met and an opportunity to be heard.

Nevertheless, there is a strong body of opinion which holds that if natural justice and fairness are assimilated the result will be a dangerous devaluation of the content of procedural fairness;

"that even as the doctrine finds new fields to conquer it is being emasculated from within, honoured in name but dangerously devalued in substance".(134) Apparent support for such an assertion is indeed to be found in a number of cases in which fairness was held to involve something less than the usual "minimum" content of natural justice. In this category are MALLOCH v. ABERDEEN CORPORATION(135) in which a majority of the House of Lords espoused a concept of natural justice which Clark has labelled "a travesty of fair play"(136) and R. v. SECRETARY OF STATE, ex parte HOSENBALL(137) where a similar approach was taken by the English Court of Appeal. Both cases held that, in the particular circumstances, fairness required a hearing but not notice of the case to be met. Comparing HOSENBALL with earlier English authority A. Beaven has said that the case is "disturbing" because "[i]t gives an illusion of fairness while denying analien one of its basic elements".(138) In a similar vein Lord Morris, for the minority, in MALLOCH objected to so applying the fairness doctrine, feeling that it would be better to hold that there was no common law duty of fair procedure than to dilute its content to the extent that the majority did: "it would be a hollow and barren manifestation of natural justice to say that as of right someone may be heard in defence of himself but only against an unknown charge".(139)

Against this, however, it should be noted again that while some judges have chosen to portray natural justice as having a "minimum" content it has always been regarded as a flexible standard imposing varying requirements that are molded to suit the particular situation. If indeed natural justice is being carried into new fields under the name of fairness there is no logical reason to believe that a "minimum content" prescribed in different contexts and in a different era may not itself be modified.(140) This basically is the view expressed by Megarry V.C. in McINNES v. ONSLOW FANE:

> I do not think that much help is to be obtained from discussing whether "natural justice" or fairness is the more appropriate term. If one accepts that "natural justice" is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as "judicial", "quasi-judicial" and administrative. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word "justice" and to use instead terms such as "fairness", or "the duty to act fairly".(141)

Similarly, de Smith did not feel that fairness and natural justice were different in content. It has been noted that he expressed the view that fairness involved only observance of "the rudiments of natural justice for a limited purpose". This is, however, more a recognition of the need to modify natural justice in the new, analytically administrative areas which the doctrine has conquered than an acceptance that "fairness" is of necessity something different in content. Indeed, it was de Smith's view that "[g]iven the flexibility of natural justice, it is not strictly necessary to use the term 'duty to act fairly' at all".(142)

It is reasonably clear, therefore, that there is no imperative reason for believing that natural justice can be distinguished from fairness having regard only to the procedural requirements imposed. Any purported distinction along these lines is based on a misconception of the nature of natural justice itself. It arises from a failure to recognize that procedures which were considered to be "fundamental" to natural justice in other circumstances are not necessarily appropriate to be imposed upon the exercise of Minister's powers (as in HARDAYAL and ex parte HOSENBALL) or to analytically "administrative" powers whose exercise is closely controlled by statute (as in MALLOCH). As natural justice spreads its net ever-wider it is indeed necessary to enlarge the mesh at the periphery in order to ensure that the flow of administrative business is not unduly hindered. If, then, it is sought to distinguish natural justice from fairness it must be done on grounds other than the procedural content of each.

(4) CONSEQUENCES OF BREACH OF FAIR PROCEDURE

The effect of a breach of natural justice and/or fairness is an issue which has given rise to considerable disagreement amongst the judges and to a good deal of academic debate. Dr. Taylor takes the view that in both types of situations the action is void and not voidable. In his view "[i]t is clear beyond doubt.... that there is no distinction between fairness and natural justice in terms of remedy or consequent nullity".(143) Professor Wade has expressed the view that two recent House of Lords decisions unequivocally adopt the view that an order made in breach of natural justice is void.(144) Nevertheless, Professor Wade is forced to concede but cannot explain why "confusion still prevails in the (English) Court of Appeal".(146)

It is odd, too, if the view of the majority in RIDGE v. BALDWIN that breach of natural justice renders a decision void is so clearly correct that the Privy Council should have taken the opposite approach in DURAYAPPAH v. FERNANDO.(147) To many academic writers it is the confusion of the English Court of Appeal and the Privy Council which dominates this area. The picture is not at all as clear as Drs. Wade and Taylor paint it. It would not be appropriate at this point to discuss fully the status of decisions reached in breach of natural justice or the remedies available.(148) For present purposes it is sufficient to note the uncertainty. It has been said that the case law "affords a spectacle of anarchy upon which order can hardly be superimposed".(149) The late Professor de Smith warned that "[b]ehind the simple dichotomy of void and voidable (invalid and temporarily valid) acts lurk terminological and conceptual problems of excruciating complexity".(150) There is admittedly "a morass of inconsistent and often unconsidered judicial dicta".(151)

The status of such decisions is equally uncertain in Canada. As in England, judicial dicta point in at least two directions. Thus, there are decisions of the Supreme Court to the effect that the result is to render a decision void,(152) while other judgments suggest that there may be degrees of invalidity.(153) Professor Reid has concluded that denial of natural justice renders a decision voidable ab inito.(154)

If it is once granted that there is uncertainty as to the consequences of a breach of natural justice it must be accepted that this is not a strong foundation on which to build a theory which seeks to distinguish fairness from natural justice. If it is sought to distinguish "A" from "B" on the grounds that the latter lacks quality "C" it must be shown not only that "B" is lacking that quality but also that "A" -beyond any doubt- has it. It is not enough to say simply that "A" may have "C" (though it may not) and that "B" probably does not (though it may).

Issue must be taken too with G.D.S. Taylor's assertion that "[b]reach of the duty to act fairly makes the action void and not voidable".(155) (Dr. Taylor assumed that this was the consequence of breach of natural justice.) It is his view that "[h]ad breach made the action merely voidable, then the remedies of mandamus, prohibition, and declaration would have been unavailable".(156) Taylor's assertion may seem to be logical, but it cannot at the present time be taken as authoritative. It is neither generally accepted that declarations cannot be granted where the act or judgment complained of is merely voidable(157) nor that manadamus can only issue without certiorari in aid where the decision was void.(158)

In the end, therefore, neither the consequences of a breach of natural justice nor the consequences of a breach of fairness are certain. It admittedly cannot be said that this provides strong evidence in favour of the assimilation of the two terms into one concept. At the very least, however, it demonstrates that no distinction can find its basis in this area.

(5) CONCLUSION AND SUMMARY

It is hoped that this Chapter has demonstrated that there is no valid or logical basis for attempting to distinguish natural justice from fairness. The question is one of semantics only, the two terms being merely alternative expressions for the same legal concept. No ground for distinction is to be found by reference to the criteria giving rise to the duty, the circumstances to which it attaches, its content, or the consequences of breach.

A number of important points have arisen in the course of the preceding discussion and it is perhaps appropriate to briefly review these before proceeding to a consideration of the supervisory jurisdiction of the courts.

GENERAL

(1) Canadian courts have recently begun to use the term "fairness" to connote minimal standards of procedural fair play. Our courts have not yet expressly put behind them the possibility of distinguishing this standard from that imposed by natural justice. To attempt to so distinguish would, however, result in considerable confusion and "yields an unwieldly conceptual framework". (See Introduction to Chapter 2)

(2) If a comprehensible jurisprudence of due process is to be developed in Canada it is undersirable that the two be distinguished. (See Introduction to Chapter 2)

CRITERIA

(3) The term "a duty to act judicially" has both a general and a specific meaning in Canadian law. (See Chapter 2 (1))

(4) Used generally, that term carries the meaning attributed to it by the Supreme Court of Canada in L'ALLIANCE. The duty arises whenever a power is being exercised which is capable of affecting the rights of others. (See Chapter 2 (1-iv))

(5) Used in the context of applications for review under s.28 of the FEDERAL COURT ACT 1970 however the term carries the meaning attributed to it by the Supreme Court of Canada in COPITHORNE and by the Privy Council in NAKKUDA ALI. (See Introduction to Chapter 2)

(6) The criteria enumerated by the Privy Council in DURAYAPPAH v. FERNANDO are not to be understood to be criteria giving rise to a duty to act fairly/judicially, but rather as factors relevant to determining the content of the duty in any given case. (See Chapter 2 (1-vi))

ADHERENCE

(7) A duty to comply with the requirements of natural justice may arise in the particular circumstances of cases involving (i) dismissal

of employees dismissable at pleasure (see Chapter 2 (2-1)), (ii) admission of aliens to citizenship (see Chapter 2 (2-2)), (iii) the exercise of town planning powers (see Chapter 2 (2-3)); (iv) the exercise of control over certain spheres of human activity by trade and professional associations (see Chapter 2 (2-4)).

CONTENT

(8) Natural justice/fairness is a flexible standard which is molded to meet the circumstance of the particular case. A number of dicta suggesting that the standard involves a minimum content must be viewed in their historical context and should not be seen as precluding further modification of the standard imposed by natural justice as it extends to occupy new fields (see Chapter 2 (3)).

CONSEQUENCES OF BREACH

(9) The effects of breach of natural justice and fairness in terms of consequent nullity cannot be distinguished (see Chapter 2 (4)).

FOOTNOTES - CHAPTER 2

(1) "NATURAL JUSTICE" by Paul Jackson, Sweet and Maxwell, 1973, Modern Legal Studies. pp. 36-37.

(2) RE H.K. (AN INFANT) [1967] 2 Q.B. 617.

(3) ibid at p. 630 A.

(4) ibid at p. 630 B-D. Professor Wade has argued that this case and, therefore, the resultant dectrine was based on a misapprehension as to the effect of RIDGE v. BALDWIN: "Lord Parker's attempt to distinguish NAKKUDA ALI v. JAYARATNE, without mention of RIDGE v. BALDWIN, suggests that his opinion was based on the misapprehension that the former case was good law". "Administrative Law", 4th ed., 1977, p. 446.

(5) "FAIRNESS: THE NEW NATURAL JUSTICE?" by D.J. Mullan, 1975, University of Toronto Law Journal 281 at p. 305.

(6) [1978] 88 D.L.R. (3d) 671 (S.C.C.).

(7) ibid at p. 680.

(8) [1975] 2 S.C.R. 62.

(9) [1975] 61 D.L.R. (3d) 77.

(10) [1978] 1 S.C.R. 470.

(11) [1978] 12 A.R. 505.

(12) [1979] 4 W.W.R. 725.

(13) (unreported) Dec. 13, 1979.

(14) per Laycraft J. in McCARTHY v. CALGARY SEPARATE SCHOOL BOARD, supra. at 734.

(15) In order to avoid unnecessary verbosity "judicial" will be used to include both "judicial" and "quasi-judicial". It is submitted that the view of Gale J. in POSLUNS v. TORONTO STOCK EXCHANGE [1966] 46 D.L.R. (2d) 210 at 313 is correct despite the continuing wide-spread usage of both terms by the courts: "the cases appear to me to use the words 'judicial' and 'quasi-judicial' interchangably. In no case have I found a judge drawing any real distinction between the two terms in order to require a tribunal to abide by higher standards of procedure in the one case than in the other".

(16) per Stevenson J. in RITCHIE v. THE CITY OF EDMONTON, Alberta Queens Bench, unreported, 17 January, 1980.

(17) per Wooten J. [1975] 2 N.S.W.L.R. 446 at 478D.

(18) see, for example: S.A. de Smith, "Judicial Review of Administrative Action" (3d ed 1973), Stevens & Son, London. D.J. Mullan, 25 U.T.L.J. 281.

(19) Mullan 25 U.T.L.J. p. 281 at 303.

(20) per Lord Morris, FURNELL v. WHANGAREI HIGH SCHOOLS BOARD [1973] 2 N.Z.L.R. 705 at 718. (PC).
Also, ex p BENAIM [1970] 2 Q.B. 417 per Lord Denning: Pergamon Press [1971] Ch. 388 per Sachs L.J.
See also the New Zealand Cases SMIT v. EGG MARKETING AUTHORITY (unreported judgment of March 21, 1973) and PAGLIARA v. ATTORNEY GENERAL [1974]] N.Z.L.R. 86.
For a contrary interpretation of these cases see Northey 1974 N.Z.L.J. 133 and 6 N.Z.U.L.R. 59.

(21) (unreported) SCC decision of Dec. 13, 1979.

(22) BATES v. LORD HAILSHAM [1972] 3 A.E.R. 1019 at 1024.

(23) [1979] 1 S.C.R. 311.

(24) [1958] S.C.R. 24 at 30.

(25) [1928]] K.B. 411, 415.

(26) Mullan (1975) 25 U.T.L.J. 281 at 289.

(27) [1970] 1 O.R. 237 at 242.

(28) per Salter J. in R. v. LEGISLATIVE COMMITTE OF THE CHURCH ASSEMBLY, EX. P. HAYNES-SMITH, supra, note 25; cited by Lord Reid, RIDGE v. BALDWIN [1964] A.C. 40 at 74.

(29) R. v. SMITH [1844] 5 Q.B. 614.
ex. p. RAMSHAY [1852] 18 Q.B. 173.
OSGOOD v. NELSON [1872] L.R. 5 H.L. 636 at 649.
COOPER v. WANDSWORTH BOARD OF WORKS [1863] 14 Q.B. (N.S.) 180.
HOPKINS v. SMETHWICH L.B. [1890] 24 Q.B.D. 712.
DE VERTEUIL v. KNAGGS [1918] A.C. 557.
WOOD v. WOAD [1874] 11 Ch.D. 353.
WEINBERGER v. INGLIS [1919] A.C. 606.

(30) R. v. ELECTRICITY COMMISSIONERS [1924] 1 K.B. 171 at 198.

(31) "ADMINISTRATIVE LAW" 4th ed., OXFORD UNIVERSITY PRESS p. 444 Professor Wade has given an interesting historical account of how this abuse of language originated. The courts justified their interventions in the following manner: "They held that every judicial act is subject to the procedure required by natural justice; and they then denominated the great majority of administrative acts as 'judicial' for this purpose. Instead of saying, as was in fact the truth, that natural justice must be observed in both judicial and administrative acts, the courts stretched the meaning of 'judicial' in an unnatural way". (ibid at 429).

(32) e.g. LAPOINTE's case [1906] A.C. 535.
BONANZA CREEK [1908] XL S.C.R. 281.
ST. JOHN v. FRASER [1935] S.C.R. 441.
MANTHA v. CITY OF MONTREAL [1939] S.C.R. 458.

(33) [1953] 2 S.C.R. 140 at 161.

(34) [1959] S.C.R. 24.

(35) NAKKUDA ALI v. M.F. de S. JAYARATNE [1951] A.C. 66.

(36) [1957] 22 W.W.R. 406.

(37) [1965] S.C.R. 12 at 17.

(38) e.g. DOWHOPOLUK v. MARTIN [1972] 10.R. 311.

(39) [1978] 12 A.R. 31.

(40) [1975] 61 D.L.R. 3d 77 (S.C.C.).

(41) This (untenable) distinction will be discussed later in Chapter 3.

(42) In MITCHELL v. R. s. 16(1) of the PAROLE ACT, RSC 1970, c. P-2 provided that "A member of the Board....may.... suspend any parole....and authorize the apprehension of a paroled inmate whenever he is satisfied that the arrest of the inmate is necessary or desirable in order to prevent a breach of any term or condition of the parole or for the rehabilitation of the inmate or the protection of society".

In COPITHORNE, s. 63(1) of the WATER RESOURCES ACT provided that "Any licensee for the purpose of the authorized undertaking may with the consent in writing of the Minister take and acquire by expropriation any lands....which the Minister may deem necessary for the authorized undertaking".

(43) [1959] S.C.R. 24 at 33.

(44) see, for example, Ritchie J. supra note 15 at 93.

(45) see later, Chapter 3.

(46) per Spence J. supra note 15 at 97.

(47) [1978] 12 A.R. 505 at 524, para 20.

(48) [1979] 4 W.W.R. 725 at 737.

(49) per Dickson J., Martineau (2) (unreported decision of Dec. 13, 1979 at p. 16 of the transcript).

(50) Professor D.P. Jones (1975) 21 McGill L.J. 435 at 438.

(51) HOWARTH v. N.P.B. [1973] 50 D.L.R. (3d) 349.

(52) [1978] 1 S.C.R. 123.

(53) M.N.R. v. COOPERS & LYBRAND [1979] 1 S.C.R. 497.

(54) MARTINEAU (#2) supra., note 49 at p. 12.

(55) ibid at p. 12.

(56) i.e. "judicial" in the sense of s.28 FEDERAL COURT ACT.

(57) supra., note 49 at p. 12.

(58) per Salter J., supra.

(59) [1978] 1 S.C.R. 470.

(60) ibid at 478.

(61) ibid at 479.

(62) This is apparent from their adoption of Lord Denning's statement in SELVARAJAN v. RACE RELATIONS BOARD [1976] 1 A.E.R. 13 at 19. See [1978] 88 D.L.R. (3d) 671 at 682.

(63) (1977) 3 Mon. U.L.R. 191.

(64) [1967] 2 A.C. 337, 339.

(65) supra., note 63 at 201.

(66) [1975] 2 N.S.W.L.R. 446.

(67) "using natural justice in its specific sense, and not merely as a pretentious name for fairness" per Wooten J. IBID at 478D.

(68) IBID at 478E.

(69) Indeed, there is a strong case to the effect that the cases he does cite do not in fact support his conclusion: see generally G.D.S. Taylor 1977, 3 Monash U.L.R. 191.

(70) [1973] F.C. 1018.

(71) [1974] 50 D.L.R. (3d) 349.

(72) s.16 PAROLE ACT R.S.C. 1970 cP-2.

(73) R.S.C. 1970 C.10 (2 Supp.).

(74) per Pigeon J. for the majority of the Supreme Court of Canada in Howarth, supra note 5.

(75) s.28(1) FEDERAL COURT ACT, supra. note 7.

(76) On appeal to the Supreme Court of Canada (supra. note 5 at 352). Pigeon J. expressly approved this approach: "I fail to see how the enactment of the FEDERAL COURT ACT could be considered as having the effect of changing the law in that respect; s.28(1) clearly refers to the law as it stood at the time.... In NORTH BRITISH RAILWAY v. BUDHILL COAL AND SANDSTONE CO. [1910] A.C. 116, Lord Loreburn, L.C. said (at p. 127): 'When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense'".

(77) [1973] F.C. 1018 at 1024G.

(78) ibid 1024-1025.

(79) ibid 1025A.

(80) ibid 1025B.

(81) supra note 5.

(82) [1965] 1 C.C.C. 168.

(83) [1959] S.C.R. 24.

(84) supra., note 5 at p. 357.

(85) see also MITCHELL v. R. [1975] 61 D.L.R. (3d) 77 (S.C.C.) per Laskin C.J.C. at 83: "Whether a hearing must be given, whether at least an opportunity must be given in some way to meet an adverse decision or proposed decision, should not be determined merely by a classification of the tribunal so as to carry the result by the mere fact of classification". In this case, however, Laskin C.J.C. spoke only for himself, the majority of the court preferring simply to classify the National Parole Board as "administrative" and concluding that *therefore* natural justice did not apply.

(86) For a more general discussion of the position of persons with no 'right' affected see Chapter 3.

(87) [1964] A.C. 40 at p. 65.

(88) McCARTHY v. BOARD OF TRUSTEES OF THE CALGARY ROMAN CATHOLIC SEPARATE SCHOOL DISTRICT (#1) [1979] 4 W.W.R. 725.

(89) citation of Lord Wilberforce in MALLOCH v. ABDERDEEN CORPORATION ([1971] 2 A.E.R. 1278 at 1294H) at [1979] 4 W.W.R. 725.

(90) Laskin C.J.C., for the majority, cites de Smith: see [1978] 88 D.L.R. (3d) 671 at 679: "public policy does not dictate that tenure of an office held at pleasure should be terminable without allowing its occupant any right to make prior representations on his behalf; indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary".

(91) [1870] L.R. 6 Ch. App. 489.

(92) G.D.S. Taylor, "FAIRNESS AND NATURAL JUSTICE - DISTINCT CONCEPTS OR MERE SEMANTICS" 1977, 3 *Monash ULR* p. 191 at p. 196.

(93) per Widgery L.J. in SCHMIDT v. SECRETARY OF STATE FOR HOME AFFAIRS [1969] 2 Ch. 149, 172.

(94) GAIMAN v. NATIONAL ASSOCIATION FOR MENTAL HEALTH [1971] Ch. 317 at 337.

(95) Taylor, supra. note 26 at p. 196.

(96) ibid.

(97) R.S.C. 1970, c. C-19.

(98) s.10(1) CITIZENSHIP ACT.

(99) per Thurlow J.A. (for the Federal Court of Appeal) in LAZAROV v. SECRETARY OF STATE OF CANADA [1973] F.C. 927 at 938I.

(100) [1972) 10.R., 311 at 317.

(101) supra. note 33 at 938 F-G; c. F. however, PRATA v. MINISTER OF MANPOWER AND IMMIGRATION [1975] 52 D.L.R. (3d) 383 (S.C.C.).

(102) [1965] S.C.R. 512.

(103) per Freedman J.A. cited by Hall J. supra. note 36 at 520.

(104) ibid.

(105) see, for example, RE HOWARD AND CITY OF TORONTO [1928]. 1 D.L.R. 952 (C.A.).

(106) RE MULTIMALLS INC AND ATTORNEY-GENERAL FOR ONTARIO [1975] 50.R. (2d) 248 (D.C.); RE ZADREVEC AND TOWN OF BRAMPTON [1973] 37 D.L.R. (3d) 326 (Ont., C.A.); RE LACEWOOD DEVELOPMENT CO. AND CITY OF HALIFAX [1975] 58 D.L.R. (3d) 383 (N.S., S.C., A.D.); CAMPEAU CORPORATION v. THE COUNCIL OF THE CITY OF CALGARY [1978] 12 A.E. 31; RITCHIE v. THE CITY OF EDMONTON (unreported judgment of Mr. Justice Stevenson of the Alberta Q.B., 17 January 1980).

(107) [1978] 3 A.E.R. 216 at 218.

(108) [1975] 2 S.C.R. 62 at 67 per de Grandpre J.

(109) supra. note 26 at 197.

(110) In Taylor's view, "the proposition that natural justice adheres to the power derives from the former need to classify powers as judicial, quasi-judicial or administrative". supra. note 26 at 198.

(111) [1978] 88 D.L.R. (3d) 671 at 680.

(112) cited ibid; from de Smith's "Judicial Review of Administrative Action" 1973 at 208-9.

(113) [1975] S.C.C. 61 D.L.R. 3d 77 at 83. The emphasis is mine.

(114) [1978] I S.C.R. 470 at 479.

(115) ibid. at 478.

(116) [1972] 1 W.L.R. 534 at 547.

(117) [1949] 1 A.E.R. 109 at 118C.

(118) ibid. at 118E.

(119) [1964] 46 D.L.R. (2d) 210 (Ont. H.C.).

(120) ibid. at 319.

(121) [1968] S.C.R. 330.

(122) [1906] A.C. 535 (P.C.; Can.).

(123) per the Lord Chief Baron, [1874] L.R. 9 Ex 190.

(124) [1908] 40 S.C.C. p. 281 at 288.

(125) [1953] 2 S.C.R. 140 at 156.

(126) [1965] S.C.R. 12 at 18.

(127) [1974] 1 W.W.R. 79 at 300.

(128) 50 D.L.R. [1975] (3d) 349 at 357 (S.C.C.).

(129) [1971] 2 A.E.R. 1278 at 1288 where Lord Morris took a substantially different view from his colleagues as to the realities of the situation regarding notice; cf. Lord Reid at 1282 supra.

(130) R. v. GAMING BOARD, ex. p. BEHAIM & KHAIDA [1970] 2 Q.B. 417.
MALLOCH v. ABERDEEN CORPORATION [1971] 1 W.L.R. 1578.
McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211.

(131) supra.

(132) supra. at 682.

(133) [1976] 1 A.E.R. 13 at 19.

(134) D.H. Clark 1975 P.L. 27 at 28.

(135) MALLOCH v. ABERDEEN CORPORATION [1971] 1 W.L.R. 1578.

(136) supra. at 41.

(137) [1977] 3 A.E.R. 452.

(138) [1977] P.L. 201 at 208.

(139) [1971] 2 A.E.R. 1278 at 1288.

(140) see generally Chapter 4 for a discussion of how the appropriate procedure is to be determined in any given fact situation.

(141) [1978] 3 A.E.R. 211 at 219.

(142) supra. at 208-9.

(143) (1977) 3 Mon. U.L.R. 191 at 208.

(144) Wade, "Administrative Law", 4th ed., 1977, p. 450. The cases which Professor Wade cites are ANISMINIC LTD. v. FOREIGN COMPENSATION COMMISSION [1969] 2 A.C. 147 and HOFFMAN - LA ROCHE v. SECRETARY OF STATE FOR TRADE AND INDUSTRY [1975] A.C. 295.

(145) HOFFMAN - LA ROCHE, supra. note 2 at 365.

(146) Wade, supra. note 2, referring to R. v. SECRETARY OF STATE FOR ENVIRONMENT, ex. p. OSTLER [1975] A.C. 295.

(147) [1967] 2 A.C. 337.

(148) for a fuller discussion see below CHAPTER 5.

(149) The quotation is from p. 70 of "NATURAL JUSTICE" by Paul Jackson, 1973, Sweet & Maxwell. The view expressed is however attributed to Runinstein, "JURISDICTION AND ILLEGALITY", 1965, Clarendon Press, at p. 220.

(150) de Smith, p. 130-131, "JUDICIAL REVIEW OF ADMINISTRATIVE ACTION", 1973, (3d ed.) STEVENS & SON.

(151) ibid at 131.

(152) e.g. L'ALLIANCE DES PROFESSEURS CATHOLIQUES [1953] 2 S.C.R. 14.

(153) e.g. the decision of the Alberta Court of Appeal in CAMPEAU CORPORATION v. COUNCIL OF THE CITY OF CALGARY [1978] 12 A.R. 31 at 60 where Lieberman J.A. (for the Court) adopts the view of Lord Denning M.R. in R. v. PADDINGTON VALUATION OFFICER [1966] 1 Q.B. 380 at 410-403. cf. however ANISMINIC v. F.C.C. [1969] 2 A.C. 147 at 170 where Lord Reid said that "there are no degrees of nullity".

(154) Reid relies on 2 recent cases in support of this proposition: RE WILBY & MINISTER OF MANPOWER & IMMIGRATION [1975] 59 D.L.R. (3d) 146 at 150. RE DAIGLE & C.T.C. [1975] F.C. 8. See p. 468 of Reid & Davids' "Administrative Law & Practice" (2d ed., 1978) Butterworths & Co., Toronto.

(155) Taylor, op. cit. at p. 207.

(156) ibid.

(157) de Smith, op. cit., p. 462 et seq.
Rubinstein, op. cit. p. 118.
I. Zamir, "The Declaratory Judgment" (1962) Stevens & Sons, 160 et seq.
Akehurst, "Void or Voidable? - Natural Justice and Unnatural meanings" (1968) 31 M.L.R. 2 and 138 at pp. 8-10.

(158) de Smith, op. cit. pp. 483 and 486.

CHAPTER III - THE EXTENT OF THE SUPERVISORY JURISDICTION OF THE COURTS

> "[T]hey must act in good faith and
> fairly listen to both sides, for
> that is a duty lying upon every
> one who decides anything."
> -Lord Loreburn, 1911(1)

Granted therefore that natural justice and fairness are identical in all material respects, the question arises as to what limits are placed upon the supervisory jurisdiction of the courts. This question in turn resolves itself into two main issues: that of qualitative and quantitative limits of jurisdiction, and that of the interpetation of contractual and statutory provisions. These two main issues give rise to five questions which, when answered, will indicate the limits of the Court's supervisory jurisdiction: FIRST, whether the "rights test" of the applicability of natural justice as outlined in the preceding Chapter indicates a threshold below which the court has no supervisory role to play or whether the quality of the interest affected is merely one factor to be considered amongst others in determining the appropriate standard of fair play required in any given case; SECONDLY, whether there is a quantitative range such that the court will not intervene if a sufficiently large number of people are affected by the decision reached; THIRD, the efficacy of clauses purporting to exclude judicial review, whether in statutes or as contractual provisions; FOURTH, the importance of the maxim expressio unius exclusio alternius in situations where there are written codes of procedure; and FIFTH, whether the nature of the decision-maker in itself has any bearing on the supervisory jurisdiction of the courts.

(1) OF THRESHOLDS(2)

It has been argued in the preceeding Chapters that a duty to comply with common law standards of fair procedure is universal and arises whenever one person or body has the legal authority to determine questions affecting the rights of others. The supervisory jurisdiction of the Court in no way depends upon it's ability to characterize the body which made the impugned decision as judicial or quasi-judicial.

This statement carries the implication that there are two possible limitations to the Court's supervisory jurisdiction in the area of natural justice. The questions arise both as to what constitutes a "determination" and as to what nature of interest amounts to a "right". These two issues are linked at least to this extent: it cannot be meaningfully said that a "right" has been affected if no "determination" has been made. Thus, a preliminary decision by the Inspector of Taxes to investigate a particular case of tax avoidance does not affect the "rights" of anyone. It is only at the final "determination" of the assessment appeal board that "rights" are affected.(3)

However, this is not to say that there can never be a prelimary decision which is capable of affecting legitimate interests:(4) only that there is something of a reciprocal relationship between the two in that the quality of "right" in issue is diminished in situations involving a decision not amounting to a final determination. Much of the case law, however, discusses the requirement that there be a "determination" entirely apart from the question of what constitutes a right. For the sake of convenience and of clarity therefore these issues will be discussed separately below.

(i) RIGHTS

In strict jurisprudence a right is seen as correlative to a duty such that "[w]hen a right is invaded, a duty is violated".(5) Professor Hohfeld has explained the relationship as follows:

> if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove best.(6)

Used in this sense the word "right" may be meaningfully distinguished from "privilege" or "liberty" (correlative of "no-right"), "power" (correlative of "liability") and "immunity" (correlative of "disability").(7) Generally, however, the term "rights" has tended "to be used indiscriminately to cover what in any given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense....".(8) Indeed, although legal philosophers may abhor the use of the word "right" to cover this omnibus category, in the area of natural justice some judges have specifically warned that the term is not to be understood in its strict jurisprudential sense. Delivering judgment in HARVIE AND GLENBOW RANCHING LTD. v. CALGARY REGIONAL PLANNING COMMISSION, 1978,(9) Clement J.A. adopted the following statement of de Smith as accurately reflecting the state of the law in Alberta:

> in this context the term "rights" is to be understood in a very broad sense, and is not to be confined to the jurisprudential concept of rights to which correlative legal duties are annexed. It comprises an extensive range of legally recognised interests, the categories of which have never been closed.(10)

Nor is the idea that "rights" is to be understood in an expansive sense in the area of natural justice particularly novel. More than twnety years ago Cooke J. of the New Zealand Court of Appeal commented on Lord Atkin's dictum that the Court will exercise its supervisory jurisdiction "whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority":(11)

> I am conscious of the fact that, although Lord Atkin's words have become almost classic, there is little direct authority as to the precise meaning and effect that should be ascribed to the expression "rights of subjects". The word "rights" itself is sometimes used to describe a more general concept that is often called a liberty: see Salmond on Jurisprudence, 9th edn., pp. 299-301. That Lord Atkin's words are capable of application to rights of this wider kind I do not doubt.(12)

The judgment of a solitary judge in the New Zealand Court of Appeal (albeit concurred in by one of his brethern on a bench of five) is not, however, generally binding and many courts have chosen to ignore the views of Cooke J. and de Smith(13) in their analysis of "rights". The law reports are replete with examples wherein the courts have simply classified a particular interest as a "privilege" or "immunity" so as to hold that the principles of natural justice did not apply. All too often the judges have substituted nomenclature for analysis, giving no adequate reasons for the classifications they make.

The most notorious Commonwealth example of such an approach is NAKKUDA ALI v. M.F. DES JAYARATNE(14) where Lord Radcliffe for the Privy Council classified a textile license as a mere privilege(15) and in effect held that a man holding such a licence did not have a right to be heard before having his livelihood taken away. The portion of Lord Radcliffe's judgment relevant to the present discussion was expressly approved by the Canadian Supreme Court in the COPITHORNE case.(16) Similarly, citizenship status,(17) attendance at a University,(18) and matters of internal discipline(19) have all at various times been held not subject to the principles of natural justice because no "rights" are involved.

(ii) "RIGHTS" IN THE 1970's

The question arises, therefore, as to how the word "rights" is going to be defined by the Courts in the future. Will Canadian judges opt for the restrictive approach of NAKKUDA ALI or will they adopt a broad, expansive view similar to that advocated by Clement J.A. in HARVIE AND GLENBOW RANCHING?

In this respect it is instructive to consider the tendancy of recent cases elsewhere in the Commonwealth. While judgments handed down in foreign jurisdictions are not strictly authoritative in any part of Canada, they can prove to be highly persuasive. So much so that one author has concluded that "English decisions have almost invariably been invested by Canadian courts with same weight of authority as Canadian precedents...."(20)

A brief survey of Commonwealth decisions reveals a strong and strengthening current of judicial opinion to the effect that the duty to act fairly should not be made to turn on narrow jurisprudential distinctions between "rights" on the one hand and "privileges", "liberties", "powers", "immunities" or "interests" on the other: Cooke J. has expressed the view that "rights" must include "liberties" at least within its ambit;(21) Megarry V.C. has called it a "protean word" which carries a "wide variety of meanings"(22) Lord Denning M.R. has stressed that there may be a duty to afford a hearing even though no "positive right" was involved(23) and that "privileges" are included;(24) in RIDGE v. BALDWIN Lord Reid also thought that it extended at least far enough to include "privileges" as well as strict "rights".(25) Indeed, it is apparent that RIDGE represented a turning point in Commonwealth law which is of considerable importance quite apart from the general repudiation of the idea that there must be a "superadded" duty to act judicially before natural justice comes into play. Lord Denning drew attention to this in SCHMIDT v. SECRETARY OF STATE FOR HOME AFFAIRS:

> The speeches in RIDGE v. BALDWIN.... show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.(26)

It must not be thought, however, that the English courts have gone so far as to hold the requirements of natural justice applicable every time a decision is made the result of which may be of interest - even of paramount interest - to a particular individual. In BREEN v. AMALGAMATED ENGINEERING UNION Lord Denning M.R. emphasised this point while also taking the opportunity to reaffirm his broad dicta in the SCHMIDT case:

> It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in SCHMIDT v. SECRETARY OF STATE FOR HOME AFFAIRS (1966) 2 Ch. 149, 170-171. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation(27) of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand.(28)

While no objection can be taken to the general sentiment behind this statement, it is unfortunate that his Lordship resorted to the language of rights and privileges to describe the distinction he intended to make. The use of such words lends apparent support to the large number of cases which utilized precisely this nomenclatural taxonomy to produce decisions which are poorly reasoned if not outright antithetic to the very concept of practical justice.(29)

The devastating effects that can flow from this sort of classification is well illustrated by two recent decisions of the Canadian Supreme Court dealing with the revocation of parole. In MITCHELL v. R. RITCHIE J., for the majority, expressed the view that parole "is a privilege accorded to certain prisoners in the discretion of the Parole Board and not a right to which all prison inmates are entitled".(30) His Lordship thought this distinction to be of "fundamental importance" when interpreting the PAROLE ACT and the PENITENTIARY ACT. In the result, and for this reason, the Parole Board was not bound to act judicially in revoking parole.

It is not intended to discuss the policy arguments for or against a requirement that there be a hearing prior to revocation of parole.(31) Rather, it is sufficient to note that the majority in MITCHELL avoided the real issues by the mere fact of classification. The logic of the majority, if it may be called that, was simply as follows: "rights" were not affected; therefore there is no duty to act judicially; therefore natural justice does not apply. The dissenting judgment of Chief Justice Laskin put the counter-argument so clearly that it cannot be hoped to improve upon his remarks:

> Whether a hearing must be given, whether at least an opportunity must be given in some other way to meet an adverse decision or proposed decision, should not be determined merely by a classification of the tribunal so as to carry the result by the mere fact of classification.... [I]t is the substantive issue that a tribunal is called upon to determine, and its consequences for

> the affected person, whether in respect of his person, his status or his property, that ought to be considered as relevant to the application of the rules of natural justice.(32)

For his Lordship, the "substative issue" was that revocation of parole is "fraught with serious consequences for a parolee apart from the prospect of prolonged imprisonment. It may mean loss of job, which occurred here, loss of conditional liberty, loss of family and other association".(33) Moreover, the Board did not, either "through its counsel, or in any record material, indicate that there were reasons that could not easily be disclosed or that, on any ground, disclosure should not be openly made".(34)

These matters were not considered by the majority who preferred to wash their hands of the difficult policy considerations facing them by glibly announcing that no rights were affected. It is particularly unfortunate that Mr. Justice Ritchie did not see fit to deal with the matters raised by Dickson J. (dissenting) in HOWARTH v. NATIONAL PAROLE BOARD, just one year previous to Mitchell's case:

> I would reject out of hand any suggestion that because a paroled inmate is a convicted criminal he stands denuded of civil rights. Parole is a right which may be granted pursuant to the PAROLE ACT; when granted the paroled inmate is entitled to expect that if he observes the terms and conditions of his parole and is otherwise of good behaviour, he will remain at large.(36) The essence of parole is the release upon conditions.
>
> The term of imprisonment of a paroled inmate is, while the parole remains unrevoked and unforfeited, deemed to continue in force until the expiration thereof according to law....
>
> The gravity of the impact of revocation upon the rights of a parolee requires no emphasis. Upon revocation he is reincarcerated, He loses the

> statutory remission standing to his credit at the time of his release on parole (210 days in the case of Mr. Howarth) and he gets no credit for the time served while on parole (779 days in the case of Mr. Howarth)."(37)

The effect of the majority judgments in HOWARTH and MITCHELL was that the Parole Board was successful in making out its claim of a quite extraordinary power.(38) It may well be that there are sound policy reasons for the result, but the majority of the Supreme Court did not base their judgments on any adequate analysis of the many important issues involved. It is a pity that they did not heed Maclean J.'s old warning issued in reference to the maxim res ipsa loquitor:

> I do not think that this or any other maxim has any magical effect in solving difficulties that always occur in relating the facts of any case to the law.(39)

Surely, if there is no legal "magic" in latin words a fortiorari no magical result should flow from the word "privilege" which is, alas, firmly established as part of the very ordinary English language.

(iii) CANADIAN "RIGHTS" IN THE 1980's

Despite the majority judgments of the Supreme Court in the parole cases, there does appear to be an increasing recognition amongst Canada's judiciary of the inadequacy of an approach to natural justice which makes procedural rights turn on meaningless verbal distinctions.(40) Thus, in 1973 the Federal Court of Appeal intervened to protect the interest an alien had in becoming a Canadian citizen,(41) in 1978 the Supreme Court recognized the interest an employee dismissable at pleasure has in his employment(42) and retreated somewhat from their holdings in the parole cases.(43) Also in that year, the Alberta Court of Appeal expressed the view that the supervisory jurisdiction of the Court extended to all decisions which involve "an appreciable effect on a right or interest of a subject which is, in the view of the Court, of sufficient importance to warrant recognition",(44) and in 1979 Laycraft J. (as he then was) of the Alberta Supreme Court Trial Division said he would extend the supervisory jurisdiction of the Court to provide procedural protection for all those who may be "adversely affected".(45) The wide definition likely to be given to the term "rights" in the future is perhaps best indicated by the judgment of Mr. Justice Dickson in MARTINEAU (#2):

> To give a narrow or technical interpretation to "rights" in an individual sense is to misconceive the broader purpose of judicial review of administrative action. One should, I suggest, begin with the premise that any public body exercising power over subjects may be amenable to judicial supervision....(46)

His Lordship continued to provide a catalogue of words included within the meaning of "rights" under the Atkin dictum: "rights, interests, property, privileges or liberties of any person".(47)

(iv) RIGHTS: THRESHOLDS OR INDICATORS OF CONTENT?

It must not be thought however that Canadian judges have wonderfully clarified the law by sweeping away the analytically inadequate reliance on the use of a quasi-Hohfeldian definition of "rights" to determine the supervisory jurisdiction of the Courts.

To say that "rights, interests, property, privileges or liberties" may be protected is not to answer the question: When exactly will the Court be entitled to intervene? It will be recalled that in 1957 Cooke J. of the New Zealand Court of Appeal defined "rights" as including at least some liberties.(48) At that time Dr. Northey posed a question which is as germane today as it was then:

> If Cooke J. is correct in interpreting the dictum of Atkin L.J., to embrace at least some liberties, the question remains open and can only be answered by later decisions - which liberties are to be included and which excluded from the scope of that dictum?(49)

To place a slightly different emphasis, the question is whether there continue to exist certain classes of "right" (in its protean sense) which are beneath a qualitative threshold of the Court's supervisory jurisdiction. In Canada, as indeed throughout the Commonwealth, the starting point of any such discussion must be the Privy Council (Ceylon) decision in DURAYAPPAH v. FERNANDO.(50)

That case involved a ministerial order for the dissolution of a municipal council made pursuant to s.277(1) of Ceylon's Municipal Councils Ordinace:(51)

> If.... it appears to the Minister that a municiapal council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order.... direct that the council shall be dissolved....

In sharp contrast with the Canadian parole decisions, the Privy Council rejected the contention that the subjective wording of this statute automatically excluded a duty to act judicially. However, they declined to provide an exhautive classification of the cases where the audi alteram partem principle should be applied. In a passage which rapidly became a classic, Lord Upjohn indicated some of the factors which may be relevant:

> Outside the well-known classes of cases,(52) no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordship's opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.(53)

Subsequent cases have followed the lead provided by the Privy Council in avoiding precise definitions of when a duty to act judicially will arise. In GAIMAN v. NATIONAL ASSOCIATION FOR MENTAL HEALTH(54) Megarry J. (as he then was) expressed the view that there was no simple test. However, "there is a tendancy for the court to apply the principles to all powers of decision unless the circumstances suffice to exclude them".(55) Megarry did however provide a list of important factors to be borne in mind: "the person or body making the decision, the nature of the decision to be made, the gravity of the matter in issue, the terms of any contract or other provision governing the power to decide, and so on...."(56) The mere enumeration of such factors admittedly does not provide a clear and certain test, but Megarry J.'s reading of the authorities as they stood in 1971 lead him to believe that "it may not be possible to do much more than say that the principles of natural justice will apply unless the circumstances are such as to indicate the contrary".(57)

It will be noted that it is possible to apply the DURAYAPPAH and GAIMAN factors in two ways:

(i) to determine a minimum threshold quality of "right" below which the Court has no supervisory jurisdiction to enforce fair procedure;

(ii) to determine the appropriate content of natural justice after it has once been established that there is a judicially enforceable duty to act fairly. The crucial question may ~~now~~ be rephrased: Are there any situations in which a defendant will be able to say to the Court "You have no right to enquire at all as to the procedures which we used in coming to our decision. As a matter of law our case falls below the minimum 'threshold' which circumscribes the supervisory jurisdiction of the Courts. You have no discretion to review our procedures. We were entitled to act as unreasonably as we wished in choosing the procedures we followed. Audi alteram partem does not apply to any degree at all. The Court is not entitled even to begin an enquiry into our case".?

The overwhelmingly dominant academic view has been that the Durayappah factors do indeed indicate the existence of such a threshold.(58) Dr. Mathieson has recognised two possible interpretations of Lord Upjohn's much-cited passage:

(1) that the enumerated factors"were criteria of the existence of a duty to act judicially which, if held to exist, would necessarily carry with it the duty to observe the audi alteram partem principle". On this view, "classification is very necessary and the three general.... criteria are powerful aids in that task of classification".(59)

(2) that the three matters"were criteria of the application of the requirements of natural justice".(60) Dr. Mathieson expresses his quite unequivocal support for the former approach. In order to understand this it is important to note that he views natural justice as an immutable set of rules all of which invariably apply if a threshold limit has once been achieved. The rules are not subject to modification in the way RUSSELL v. DUKE OF NORFOLK(61) would seem to suggest. Given this view and his desire to interpret RIDGE v. BALDWIN and DURAYAPPAH consistently with NAKUDDA ALI it was all but inevitable that he should draw the conclusion he did.

A somewhat more sophisticated approach is taken by Dr. G.D.S. Taylor who argues that "the four factors set out by the Privy Council in DURAYAPPAH v. FERNANDO provide an analysis for determining whether the rules of natural justice apply and also for ascertaining the content of those rules in a given case".(62) The Taylor view is both accurate and seriously misleading at the same time. It is unfortunate that neither Dr. Taylor - nor indeed any other commentator I have been able to find - has considered the fact that the Durayappah factors are of more than one type. The mere fact of their juxtaposition in Upjohn's judgment has led to an assumption that each of the factors must be applied in the same way and towards the same end(s). Taking DURAYAPPAH and GAIMAN together we are able to isolate six major factors which should "be borne in mind when considering whether the principle should be applied or not".(63)

(1) the language of the provision (the same as Megarry's "the terms of any contract or other provision"; overlaps with #5 below);

(2) the subject-matter in issue (the same as Megarry's "gravity of the matter in issue");

(3) the circumstances of intervention (overlaps with Megarry's "decision to be made");

(4) the sanctions to be imposed (overlaps with Megarry's "decision to be made");

(5) the procedure to be followed (this in itself will usually be a factor of #1 above);

(6) the nature of the decision-maker (this would seem to be the only genuine addition made by Megarry to the Upjohn enumeration).

Of these factors only numbers (2) and (4) can be said to genuinely involve the quality of the rights in issue.(64) It is submitted that while the other factors may impose limits on the supervisory jursidction of the Court, the quality of right affected does not. Certainly, it is true that "the Court does not concern itself with trivialities", but that is a matter for judicial discretion, not an absolute limit on the jurisdiction of the Court of the type Atkin's ELECTRICITY COMMISSIONERS' dictum might seem to indicate. Moreover, it is an exception limited to only the most trifling of matters.

The correct approach was taken in McINNES v. ONSLOW FANE.(65) In dealing with the natural justice question before him in that case Megarry V.C. posed three successive questions:

(1) "whether the grant or refusal of a licence by the board is subject to any requirement of natural justice or fairness which will be enforced by the courts."(66) At this stage of his enquiry Megarry considered the presence or absence of governing terms in a statute or contract. In the abstract, it would appear that this question raises the issues relevant to the first, third, fifth, and, possibly, sixth of the "Durayappah/Gaiman factors" enumerated above. It does not involve any consideration of the quality of the "rights" involved. Indeed, Megarry V.C. devoted a paragraph to his judgment to denouncing any jurisprudential approach to rights.(67) It is important to note too that he did not at this stage of his judgment pay any consideration at all to the fact that McInnes was a mere applicant for a licence: something which would clearly have put him beneath the rights/privileges threshold on either a NAKUDDA ALI or a BREEN v. AEU approach.

(2) "where the court is entitled to intervene, I think it must be considered what type of decision is in question."(68) This consideration would appear to be aimed at determining whether the courts, as a matter of its discretion, should seek to intervene. Megarry expressly disclaims any intention of providing a "clear or exhaustive classification" at this stage, but in the case before him

he focussed exclusively on issues relevant to the quality of rights in issue.(69) As a matter of logic, however, it would seem that any of the six "Durayappah/Gaiman factors" might be relevant here.

(3) "there is the question of the requirements of natural justice or fairness that have to be applied in an application case such as this".(70) At this stage of his enquiry Megarry V.C. focussed almost exclusively on the quality of the rights affected, weighing these against the policy arguments for not providing a full hearing. Again, many of the "Durayappah/Gaiman factors" may be relevant. The classification of the "type of decision" which was made at stage 2 of the enquiry now assists in the balancing test, for the overall "quality" of the right in question has been distilled from amongst the numerous relevant factors.

Briefly, then, the McINNES case demonstrates an approach to natural justice which, while acknowledging that the nature of the "rights" involved may be of paramount importance in determining the appropriate content of natural justice, does not recognize the existence of any qualitative threshold limiting the jurisdiction of the courts. This approach is entirely consistent with the "new" natural justice, though, because linguistic habits die hard, judges may from time to time slip into the language which prevailed in the NAKUDDA ALI era. The overall trend is, however, clear. In one recent case Ashworth J. had this to say about Lord Atkin's dictum to the effect that there is an enforceable duty to act judicially whenever there is "a body of persons having legal authority to determine questions affecting the rights of subjects....":

> For my part, I doubt whether Atkin L.J. was propounding an all-embracing definition of the circumstances in which relief by way of certiorari would lie. In my judgment the words in question read in the context of what proceeds and follows them, would be of no less value if they were altered by omitting "the rights of" so as to become "affecting subjects".(71)

In a similar vein, Professor Wade has argued that the requirement of affecting rights is mere surplusage:

> This requirement is really correlative to the idea of a legal power, the exercise of which necessarily affects some person's legal rights, status, or situation.... The requirement of a decision "affecting rights" is not therefore a limiting factor; it is rather an automatic consequence of the fact that power is being exercised.(72)

Both of these passages have been expressly approved in the Supreme Court of Canada by Dickson J. in MARTINEAU (#2).(73) His Lordship continued to state an underlying premise which, I suggest, necessarily refutes any suggestion that qualitative thresholds exist:

> [A]ny public body exercising power over subjects may be amenable to judicial supervision, the individual interest involved being but one factor to be considered in resolving the broad policy question of the nature of review appropriate for the particular administrative body.(74)

(v) "UMPIRE'S DISCRETION"

If it is granted that the quality of right affected bears no relevance to the issue of the court's jurisdiction the question may be asked whether this makes any practical difference at all. It has been argued above that the court may consider the quality of right involved in determining the appropriate content of natural justice in any given set of circumstances. The result of this balancing test might very well be that the requirements of natural justice were minimal and the court may find that they had not been breached. In the end the complainant will go away without a remedy just the same as if the court had disclaimed jurisdiction in the first place.

There are, however, two strong reasons for rejecting any argument which would go on from here to say that it would be better to accept the quality of "right" involved as a limit on jurisdiction. First, under the approach that is outlined in this section, the court will at least have heard argument before disposing of the case. The plaintiff will not be turned away at the courtroom door, but will have had his chance to put his views across. Should he lose his application for judicial review he will at least know that the judge fairly listened to both sides before coming to his conclusion. Secondly, because argument has been heard, the court will be more likely to state its reasons; to make public and open the arguments it considered persuasive in determining the appropriate content of natural justice. Judges will no longer be able to avoid substantive issues by simply saying that no true, or no important enough, "right" has been involved. To accept that there are qualitative thresholds to the court's jurisdiction is to accept the rights/privileges distinction in all but name only. To refute it is to require honest and open consideration of the policy issues which are necessarily involved. In the end the quality of judgments will be better, administrators will be offered better guidance for the future, and plaintiffs will know the real reasons why they have failed in their application for judicial review. With the rejection of the "thresholds" approach it will be possible for judicial review of administrative action to become less like a game of "umpire's discretion"(75) and more like the application of a body of sound and coherent legal principles to ever-varying factual situations.

(vi) PRELIMINARY DECISIONS

In WISEMAN v. BORNEMAN(76) the English Courts were called upon to decide whether a tax tribunal constituted under the FINANCE ACT 1960(77) for the purpose of determining whether there was a prima facie case against a taxpayer was obliged to hear that person before coming to their conclusion. The Court of Appeal held unanimously that there was no such right. According to Diplock L.J. "There is no prima facie presumption that Parliament intended that the rules of natural justice applicable to final determinations, whether subject to appeal or not, should be applied to this preliminary decision."(78) For Diplock, it was to the statute that one must turn to see on what basis the preliminary decision should be made. Lord Denning M.R. too thought that the statute was conclusive against the taxpayer in this case. His Lordship emphasized that the principles of statutory interpretation would operate differently according to whether there as a final decision or not:

> If the tribunal were, at this stage, empowered to make a final determination, the courts would readily imply that the taxpayer ought to be given a fair opportunity to see the counter-statement and to correct anything in it prejudicial to his interests. But as the inquiry is only to see if there is a prima facie case, there is no

> reason to make any such implication. Natural justice does not require it: because a prima facie case decides nothing except that there is enough to call for an answer.(79)

On appeal, however, the House of Lords took pains to emphasise that there was not a difference in principle between preliminary and final decisions. Lord Wilberforce could not

> accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a prima facie case for taking action.(80)

Not all preliminary decisions are of the same nature. At the one end of the scale, "the decision may be merely.... that a prima facie case exists for taking some action or proceedings as to which the person concerned is able in due course to state his case...."(81) At the other extreme, however, a preliminary decision may have "Substantive and serious effects as regards the person affected". Thus, for example, in WISEMAN itself, "the decision of the tribunal may have the effect of denying the taxpayer the opportunity of eliminating, in limine, a claim which may otherwise have to be fought expensively through a chain of courts".(82) Their Lordships were concerned not to allow the "fundamental general principle" of natural justice to "degenerate into a series of hard-and-fast rules"(83) and preferred to consider the preliminary nature of the decision, along with the other factors relevant to determining the appropriate content of natural justice. This general, flexible approach was reaffirmed in the House of Lords in the following year.(84) In

FURNELL v. WHANGAREI HIGH SCHOOLS BOARD the Privy Council on appeal from New Zealand again took the view that it was the results flowing from a preliminary decision (in this case the temporary suspension of a teacher) which should determine the appropriate content of natural justice. The principles should not be excluded by the mere fact of characterization.(85)

It would seem too that the Canadian Courts have preferred the approach of the House of Lords to that of the English Court of Appeal. In KING v. UNIVERSITY OF SASKATCHEWAN(86) a student was denied certiorari by the Supreme Court of Canada when he had not been heard by a disciplinary committee. The narrow ground of the decision was that it was the University's Senate Committee, not the lower tribunal, which had original jurisdiction in the matter. The complainant had a right to be heard by that body, but not by the lower tribunal which only prepared a report to be placed before the Senate in the nature of evidence. At the hearing of the Senate Committee justice would be done in that the student could rebut the evidence and contentions contained in the report at that time. There was no decision, preliminary or otherwise by the lower tribunal in this case.

Such an approach was approved by Dickson J. in HOWARTH v. N.P.B.(88), quoting de Smith:

> a body exercising powers which are of a merely advisory character or which do not have legal effect until confirmed by another body, or involve only the making of a preliminary decision, will not normally be held to be acting in a judicial capacity.(89)

It will be noted that the preliminary nature of the decision is not said to invariably exclude a duty to act judicially, but only that this will normally be the practical effect.(90) Dickson has left open the possibility of saying that a preliminary decision may affect rights and therefore import the requirements of natural justice. If this is so the provisional nature of the decision will be a "significant factor"(91) in deciding the appropriate content of natural justice but will not of itself exclude a duty to be fair. Such an approach was apparently adopted by a unanimous Supreme Court of Canada in MINISTER OF NATIONAL REVENUE v. COOPER & LYBRAND.(92)

That this is the correct interpretation of the Canadian law on preliminary decisions is demonstrated by two recent Alberta cases. In CAMPEAU CORPORATION v. COUNCIL OF THE CITY OF CALGARY(93) the Alberta Court of Appeal disagreed with Milvain C.J.'s assertion that there was significance in the fact that a land use classification guide "could have no effect until approved by the Board" (the Development Appeal Board).(94) The point was made explicitly by Laycraft J. in McCARTHY v. CALGARY SEPARATE SCHOOLS(95) where he quoted Lord Denning's statement:

> The fundamental rule is that, if a persom may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.(96)

In other words, the Courts will look to the reality of the situation before them and will not be put off by a technical classification of a decision as "tentative", "preliminary" or "subject to approval". They will decide on the facts of each case arising whether and to what extent "rights" have been affected and will use their conclusion in this respect to determine the appropriate content of fair procedure.(97) The situation in Canada, as in the U.K. is that

> procedures involving the taking of advise or the receiving of a report may turn upon the stage at which the effective determination is made. The findings of company inspectors are likely to be accepted as definitive and therefore fair procedure is required. But where a report is merely "a piece of evidence" the situation is different.(98)

(2) OF RANGES

If a hearing need be given before the Board of Health closes residences belonging to one person(99) need they hear both sides before deciding to close 100 residences belong to 100 persons? Or 500? Or 10,000? If a by-law altering the zoning of a specific piece of land needs to be preceded by a hearing,(100) is there a similar requirement when the whole city is rezoned? Dr. Taylor apparantly would think not: it is only when a "power is being used sufficiently individually" that it may be said "to attract the rules of natural justice".(101) Nor does Dr. Taylor stand alone in this view. He has on his side the very weighty opinion of Professor de Smith:

> One may assume that the rule will be held to be impliedly excluded in so far as the number of persons affected by a particular order, act or decision is so great as to make it manifestly impracticable for them all to be given an opportunity of being heard by the competent authority beforehand.(102)

It is important to note that the learned authors do not make the argument that the number of people affected is one factor to be considered amongst others in determining the appropriate content of natural justice. Rather, they say that after X number of people have been affected (or X plus 1, X plus 2, or X plus 10,000) there is no duty whatsoever to comply with natural justice. The corollary of this is that the Courts have no jurisdiction to enforce procedural fair play after the numerical "range"(103) has been reached. As with thresholds, so too with ranges: will there ever be a decision of an administrative tribunal which affects so many people that the administrator will be able to say to the Court "You have no jurisdiction to even begin an enquiry in this area?"

To pose the question in such terms is to make one answer imperative: once it is accepted that the requirements of natural justice themselves are variable over a broad spectrum there is no reason to accept the quantum of people affected as a limitation on the Court's jurisdiction.(104) Indeed, it is only after hearing argument on both sides that the Court will be able to determine what fair play required in all the circumstances; and the "circumstances" must surely include the practical problems raised by the fact that the exercise of a power may affect large numbers of people. As Lord Wilberforce said in GOURIET v. UNION OF POST OFFICE WORKERS:

> A right is nonetheless a right, or a wrong any the less a wrong, because millions of people have a similar right or many suffer a similar wrong.(105)

Rights may be rights and wrongs may be wrongs, but there is none the less a very serious practical problem where the interests of large numbers of people are affected. Public adminstration must not be forced to grind to a halt by the "over - judicialization" of the procedural requirements prerequisite to decision making. Dr. Mathieson has drawn attention to the fact that administrative efficiency is a value which should be as dear to the hearts of administrative lawyers as absolute fairness:

> Is it too much to expect a greater awareness of the values of certainty and administrative efficiency on the part of student's of administrative law, and some recognition of the proposition that the courts should strive to balance those values against that of absolute fairness, which in many contexts is a mere competing value rather than one to which everything else should be sacrificed?(106)

Unfortunately, Dr, Mathieson was of the view that administrative efficiency and certainty could only be protected by maintaining the NAKKUDA ALI approach to natural justice, holding that only administrators whose functions involved the "super-added" quality of a duty to act judicially were subject to any requirement of fair procedure. As has been demonstrated in the previous Chapter, this restrictive approach has now been dispelled and the only means of achieving the balance that Mathieson seeks is by a judicial determination of what the "reasonable administrator" would do in the circumstances. Vague though it be, this is necessarily the test to be applied in seeking to balance Mathieson's two "competing values".

> In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perenial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law...."(107)

How then would a reasonable administrator deal with the problems raised by the fact that many people may be affected by his decision? Would he say to himself that he had no duty to act fairly for the sole reason that large numbers of people were affected? If he did adopt this view he would run head on with certain dicta of Verchere J. in RE CANADIAN FOREST PRODUCTS LTD.(108) That case involved the operation of a workmen's compensation scheme by a board which annually heard between 75,000 and 95,000 cases, each of which would affect a large number of employers. Verchere accepted

> that an employer's right to have notice of and attend at the adjudication of claims would delay such adjudication.... and I think it probable that, as counsel suggested, "a change in the whole structure" would be required. This, however, seems to me to be no reason for denying to any person any fundamental right to which he is entitled....(109)

It would seem from this that Mr. Justice Verchere would be willing to suffer administrative torpor if he took the view that natural justice required it. His reasoning is, however, somewhat difficult to follow on this point. It would seem to work roughly like this:

(1) the practical difficulties faced in complying with natural justice do not excuse non-compliance once those principles are held applicable; (2) However, "the rule will be held to be impliedly excluded in a situation where the number of persons affected.... is so great as to make it manifestly impractical for them all to be given an opportunity to be heard";(110) (3) Therefore, there is no duty of natural justice in this case; (4) and, the practical problem does not arise. The logic in this respect is clearly somewhat suspect. It is submitted that the learned judge became entrapped in this logical quagmire because of his presuppositions as to the nature of natural justice. This form of reasoning becomes necessary if the view is taken that the requirements of natural justice are rigid and immutable, applicable only (but necessarily) to that very limited range of decision making which bears a close resemblance to that of the Courts. Given this initial assumption and the need to come to a decision which would protect the administrators from excessive costs and trouble, Verchere was forced to double back on himself.

A more logcally robust approach was demonstrated in the New Zealand Supreme Court four years later. In WAITEMATA COUNTY v. LOCAL GOVERNMENT COMMISSION(111) Richmond J. took the view that the right to a hearing extended "to the class of subjects having rights, questions as to which are determined in the proceedings".(112) On the question of the range of a power his Lordship had this to say:

> Where a right to a hearing is enjoyed by virtue of the audi alteram partem rule, it normally carries with it a right to reasonable notice of the sitting of the particular tribunal or authority at which the matter in question is to be investigated. In the normal case, however, the persons having a right to be heard are limited in number and the giving of notice presents no difficulty. The question of the notice to be given in cases where such persons are numerous and difficult to ascertain has not, so far as I am aware, been the subject of judicial decision in English law.... If any such notice is required.... by reference to the audi alteram partem rule, then in my opinion it can only be such notice as is reasonable in the circumstances. (113)

Presumably the circumstances include more than just the numbers of people involved. They must include also the quality of the right affected, the resources and machinery of the decision-maker, the urgency of the decision, and, generally, all of the factors discussed in Chapter 4 below. The requirements of natural justice may range from full testimony and cross examination to the most attentuated form of hearing. It may involve restriction to written submissions, summaries prepared by local inspectors, a time limit on the hearing process or a cut-off point in terms of the number of submissions that will be considered. A very complex and involved balancing of these many issues and possibilities must be carried out by the administrator and, if necessary, by the Courts on review.

It would be unfortunate if administrators were to throw all concern for fair procedure to the winds merely because they were particularly powerful administrators whose decisions affected the rights of millions, not tens, of people. As with 'threshold', and for the same reasons, so too with 'range'. It would be regrettable indeed if our courts were to deny ab initio their supervisory jurisdiction in cases where many many people were affected.

(3) EXCLUSION CLAUSES AND WAIVER OF FAIR PROCEDURE

In a broad outline of the scope of natural justice provided in Chapter 1 it was said that the principles are "of universal applicability" and that they apply whether or not it can "be said that the requirement of fair play can be implied from statute or contract". It is the writer's view that in both the contractual and statutory areas only the most explicit of terms will succeed in ousting a prima facie duty to act fairly: it is not a question of determining on a balance of probabilities what the draftsman intended. In the contractual sphere the question arises as to whether and when such ouster clauses will be permitted as a matter of public policy; to what extent can a person voluntarily waive his right to be heard by an unbiased judge? The issue in the statutory area is somewhat different, for there can be no doubt of the legislatures' authority to enact any legislation it may want, fair or unfair, stupid or sagacious. Here the problem is of determining which principles of statutory interpretation are to be applied; how the underlying intention of Parliament is to be distilled from statutes and regulations, rules and codes. After it has been determined that Parliament intended the principles of natural justice to apply in a particular situation, will an individual subject to the exercise of administrative power be entitled to waive the application of those princples in his own case? This section will deal mainly with the issues arising in the non-statutory area. The special problems arising where powers are created or regulated by statute will be discussed below, in section 4 of this Chapter.

(i) DOMESTIC TRIBUNALS: THE CONTRACTUAL BASIS OF THEIR POWERS & ANTICIPATORY EXCLUSION OF FAIR PROCEDURE

In a very general sense, all tribunals, both statutory and domestic, are masters of their own procedures.(114) They are not expected to act in the way which would be required of local justices sitting as a court of law,(115) and the courts will accord them "a large measure of autonomy".(116) The degree of autonomy permitted is not, however, unlimited. Over 90 years ago Kay J. stated his view of the necessary limitation:

> It was quite true that the Court did not interfere with the internal matters of a society like a club; but there was a broad exception to that rule, namely, that when those matters were so conducted as to be contrary to every man's notion of what was just, then the Court would interfere, especially in the case of the expulsion of a member.(117)

An essentially similar view was expressed by Scrutton L.J. in YOUNGS v. LADIES' IMPERIAL CLUB.(118) His Lordship reasserted that the courts would not act in an appelate capacity from club committees "provided the committees are properly constituted and properly summoned, and deal with the matter in a way not contrary to the principles of natural justice".(119)

Sixty years ago, therefore, it was reasonably clear that domestic tribunals were bound by the rules of natural justice just as were statutory tribunals. In 1951, however, the Privy Council casr a shadow of doubt over this area by their recommendations concerning the case of WHITE v. KUZYCH, on appeal from British Columbia.(120) The question having been raised by the highest court in the Commonwealth, it became necessary for the lower courts to explain the basis on which they purported to exercise supervisory jurisdiction over the procedures used by domestic tribunals.

A tentative answer was proposed by the English Court of Appeal in the following year when Denning and Romer L.J.J. agreed that the jurisdiction of domestic tribunals arose from a contract, express or implied. According to Denning L.J.

> no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.(121)

Striking a similar cord, Romer L.J. expressed the view that the interpretation of contracts was a legal dispute and that the Court's supervisory jurisdiction to interpret the contract would not be ousted by the terms expressed.(122) This approach was quickly approved in Canada and was applied in a number of cases.(123)

Having rapidly agreed that the jurisdiction of domestic tribunals (and hence the supervisory jurisdiction of the Courts) rested on contract, the Canadian courts were faced with the more difficult problem of determining which principles of contract law should govern in such cases. The older cases made it reasonably clear that, in Canada at least, the courts would "imply" a term(124) to the effect that natural justice should be adhered to if they felt that the power claimed by the domestic tribunal were sufficiently important to warrant this step.(125) This approach was expressly approved by a unanimous Ontario Court of Appeal in BIMSON v. JOHNSTON (1958)(126) and by the Supreme Court of Canada in POSLUNS v. THE TORONTO STOCK EXCHANGE (1967).(127)

Subsequent cases in which the contract was silent as to procedure were relatively easily disposed of on this basis, and it was not necessary in such circumstances for the courts to express a view as to "whether the principle (of natural justice) springs from the law relating to implied contract or is a fundamental rule implicit in the law of the realm...."(128) That question is, however, of crucial importance in two categories of fact situation: where the contract expressly excludes the principles of natural justice, and where there is no contractual relationship or governing statutory provision involved.

In LEE v. THE SHOWMEN'S GUILD OF GREAT BRITAIN (1952) Denning L.J. dealt with this issue with characteristic frankness:

> Although the jurisdiction of a domestic tribunal is founded on a contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give a man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard.(129)

This view would seem to accord with earlier authority in both the United Kingdom and Canada. In DAWKINS v. ANTROBUS (1881) Brett L.J. was of the opinion that the court could intervene with the proceedings of domestic tribunals even if "the rules of the club are contrary to natural justice",(130) and in BELAND v. L'UNION ST. THOMAS (1890) Rose J. was of the opinion that a rule expressly excluding natural justice would not save proceedings on review by the Court.(131)

The issue did not, however, die with the early cases. Thompson J. of the Ontario High Court apparently considered the possibility of express exclusion to be an open question in 1958. In BIMSON v. JOHNSTON, it was with apparent relief that his Lordship noted:

> The Court in the instant case is not concerned with the difficult and vexing problem as to whether or not by subscribing to a constitution or rules containing express stipulation absolving the tribunal from observing the principles of natural justice, or any of them one may thus contract himself out of resort to the Courts, by reason of failure to comply therewith.(132)

Although Thompson would prefer to resolve this question as Denning L.J. did in LEE's case, certain dicta of Porter C.J.O. in the Onatrio Court of Appeal appear to be to contrary effect.(133) A number of subsequent cases have, however, lined up solidly against the possibility of express contractual exclusion of the principles of natural justice. This was the effect of KENNEDY v. GILLIS (1961),(134) HUGHES v. SEAFARERS' INTERNATIONAL UNION (1961)(135) and FOREST v. LA CAISSE POPULAIRE DE ST. BONIFACE (1962).(136) Most recently, the approach of Denning L.J. in LEE v. SHOWMENS' GUILD was expressly approved by Laycraft J. (as he then was) in POLLOCK v. ALBERTA UNION.(137) To similar effect also are two recent English cases in which the Court of Appeal held that a mandatory rule excluding a right to be represented by counsel would be ineffective.(138)

It would appear from these decisions dealing with the possibility of contractual exclusion of natural justice that the principle of fair play is "a fundamental rule implicit in the law of the realm", to use Thompson J.'s phrase.(139) Certainly, it seems odd to describe the principle as springing from "the law relating to implied contract"(140) when it has the power to strike down express terms. This view is supported too by several cases in which the principles of natural justice were held to apply to decision-making processes which were clearly not governed by a statutory provision and in which no contract was in existence.(141)

(ii) WAIVER OF NATURAL JUSTICE IN THE COURSE OF PROCEEDINGS

If then it may be taken that contractual terms cannot exclude the principles of natural justice where the contract was entered into prior to any dispute arising, the question arises of whether a party may waive his right to fair play when he is actually before a tribunal. Although a number of cases have made reference to the possibility of waiver in such circumstances this seems to be an odd result if, indeed, natural justice is "a fundamental rule implicit in the law of the realm". From a policy viewpoint it would seem undesirable in that it would expose persons appearing before administrative tribunals to considerable pressure to "waive" their procedural rights whenever asked to do so for fear of arousing antagonism in the tribunal. On the other hand, if waiver were not possible in any sense of the word a person would be able to prevent decisions against his interests merely by ensuring that he never appeared before the tribunal or made submissions to it.

The question of waiver in the course of proceedings is a difficult one and has given rise to a number of decisions which appear at first flush to be contradictory. In INDERWICK v. SNELL the Lords Commissioners appeared to think that a person protesting the jurisdiction of a tribunal and not appearing before it thereby waived his right to a hearing and had no right to come to the court complaining of breach of audi alteram partem.(142) This case was cited by James L.J. in DAWKINS v. ANTROBUS(143) who approved "every word of that judgment". In CAMAC EXPLORATION LTD. v. OIL AND GAS CONSERVATION BOARD OF ALBERTA, however, Kirby J. appeared to think that appearing at a hearing and making submissions itself amounted to a waiver of certain procedural rights (in this case the right to adequate notice).(144) In MEDI-DATA v. ATTORNEY GENERAL OF CANADA(145) the Federal Court of Appeal appeared to think that internal appeal amounted to waiver of procedural rights, yet in HARELKIN v. THE UNIVERSITY OF REGINA(146) Beetz J. would force an individual appearing before a tribunal to exhaust all possible internal remedies before coming to the Courts.

It is submitted that despite these apparent inconsistencies, the cases in this area can indeed be rationalized. The courts base their decisions on one underlying principle, using the word waiver in two different senses and applying three rules.

(a) ONE PRINCIPLE

The principle which is behind all the waiver cases is a practical one which has long been recognized by the courts. It is simply this: that a decision-making body is excused for not granting a hearing if it is faced with "obstructive conduct on the part of the person affected".(147) Indeed, the rule of audi alteram partem is correctly stated as involving "notice of the charge and a reasonable opportunity of being heard".(148) There is no rule of law that the person whose rights will be affected by the decision must avail himself of the opportunity presented as a precondition to a valid decision being made.

(b) TWO MEANINGS

The reported decisions would seem to indicate that the word "waiver" is used to cover both the situation where a person himself forces the breach of natural justice and the situation where he does not protest the breach so as to allow the tribunal to cure the defect itself, but rather consciously reserves his protest for use in seeking judicial review should a decision contrary to his interests be reached. The term does not appear to be applied in cases where the tribunal itself actively seeks waiver of fair procedure, the terminology and principles of contractual exclusion being preferred in such circumstances.

(c) THREE RULES

A reading of the cases dealing with the question of waiver of fair procedure reveals that the courts apply three rules in dealing with such cases:

(i) the plaintiff must not himself have forced the tribunal to breach natural justice;

(ii) the plaintiff must have protested the breach of natural justice to the tribunal as soon as he was aware of it so that the tribunal had the opportunity of curing the defect itself;

(iii) waiver cannot excuse a jurisdictional defect, though certain failures in procedure may be excused if rigourous procedural fair play has been waived.

Each of these rules will be discussed in turn.

(1) NON-OBSTRUCTIVE PLAINTIFF

The rule that a person subject to the jurisdiction of a domestic or statutory tribunal must make reasonable efforts to avail himself of any opportunity to be heard which is offered to him is illustrated by the decision in DAWKINS v. ANTROBUS.(149) It finds previous support from INDERWICK v. SNELL where it was said

> The plaintiffs, objecting to this meeting and considering it illegal, protested against it, but abstained from attending, and therefore made no answer or defence to and required no proof of the charges made against them. The adoption of this course was unfortunate, but does not afford any grounds for the interference of this Court.(150)

More recently, and in Canada, the same principle was reaffirmed in LABOUR RELATIONS BOARD v. TRADERS' SERVICE LTD.(151) where Judson J. for a majority of the Supreme Court of Canada thought the Board's whole duty was to offer a reasonable opportunity to be heard. In deciding against the plaintiff his Lordship made much of the fact that

> the respondent made no submissions of any kind and did not reply to the statutory notice. It had ample opportunity to present evidence and make any representations that it wished. It chose to ignore the procedure of the Board.(152)

It is submitted that this case illustrates that the rule in IDERWICK v. SNELL remains alive in Canada over 100 years after that case was heard.

(2) PROTESTING PLAINTIFF

In CAMAC EXPLORATION LTD. v. OIL AND GAS CONSERVATION BAORD OF ALBERTA(153) Mr. Justice Kirby made a statement which at first sight appears to be contrary to the rule that the plaintiff must attempt to co-operate with the tribunal if he is later to seek judicial review.

> Camac, by appearing at the hearing, making a submission and participating in the decision through its president, by applying for a recission of the orders without at any time objecting to the jurisdiction of the board or raising any objection to lack of notice, waived whatever right to which it may have been entitled to object to want of notice as a denial of natural justice and to assert that the board therefore did not have jurisdiction to make the orders.

Thus, according to DAWKINS, if you refuse to appear before a tribunal you thereby waive your right to be heard by them, and yet, CAMAC would seem to indicate that if you do appear and take part you have waived whatever ancillary procedural rights (such as a right to adequate notice or a right to counsel) that you may otherwise have had. It is significant however that Camac did not "at any time" raise "any objection to lack of notice" in their case. Having not drawn the alleged procedural defect to the attention of the Oil and Gas Conservation Board at the time when that tribunal could have taken steps to ensure that fairness was done they were denied a remedy in the court. Camac's acquiescence in the procedures used up until the time a decision was made to which they objected on its merits did not strengthen their claim to judicial review.

The correct approach in such a situation would therefore seem to be to appear before the tribunal and to protest the breach of natural justice at that time. If the tribunal then continued to ignore the requirements of fair proceudre there would be a strong case for judicial review. The decision of the Federal Court of Appeal in MEDI-DATA INC. v. ATTORNEY GENERAL OF CANADA(154) is also to this effect. In that case an interim prohibitory order was made by which the plaintiff was denied mailing privileges under section 7 of the POST OFFICE ACT.(155) He had used the mails to deliver two obscene publications contrary to s.153 of the CRIMINAL CODE (now s.164). By s.7(2) of the POST OFFICE ACT,

> Within five days after the making of an interim prohibitory order the Postmaster General shall send to the person affected a registered letter at his latest known address informing him of the order and the reasons thereof and notifying him that he may.... request that the order be inquired into....

by a Board of Review appointed by the Postmaster General. When Medi-Data appeared before the Board of Review,

> there was some discussion of the question of waiver as a result of which it is at least arguable that there was an agreement that the applicants should not be taken as waiving any rights arising out of the failure to send the letters written the five-day period.(156)

According to Chief Justice Jackett this could be effective to prevent a waiver arising, but it could "have done no more than preserve the right to challenge the orders at some subsequent time".(157) In the result Medi-data failed in their application for reivew under s.28 of the FEDERAL COURT ACT because the interim prohibitory orders were issued before that Act was passed and because they were in any case no longer in existence, having been replaced with final prohibitory orders prior to the issue coming before the court.

The policy behind this second rule respecting waiver of fair procedure is well illustrated by reference to the facts of the MEDI-DATA case. Let us assume that the courts would not recognise the possibility of waiver in such circumstances. The person before a tribunal (A) would then be faced with two possible courses of action upon discovering a breach of natural justice:

(1) He could protest the breach immediately. If the tribunal remedied the breach it would proceed to consider the merits and 'A' would have to accept its decision whether in his favour or not. If the tribunal chose to ignore the breach 'A' would, however, be able to seek judicial review.

(2) He could maintain silence about the breach of natural justice, hoping that the tribunal would not become aware of and remedy the defect. The tribunal would then hear the merits. If it decided in his favour 'A' would not complain of breach of natural justice. If, however, the tribunal decided against him he could then seek judicial review. Upon quashing there would have to be a hearing anew on the merits. Whenever possible this would have to be undertaken by a differently constituted body of persons so as not to infringe the rule against bias, and 'A' would have a second chance of obtaining a favourable decision on the merits. In effect, he would achieve an extra stage of internal appeal merely by not mentioning a procedural defect when he first became aware of it and when it could have been cured with least inconvenience to all concerned.

This second alternative is quite properly prohibited as a matter of public policy. It would add considerably to the expense of both public and private administration and would translate judicial review of procedure into what effectively would become a court-aided internal appeal on the merits. It would, however, be the only rational course of action for a person appearing before a tribunal if it were allowed by the courts.

(3) JURISDICTIONAL DEFECTS CANNOT BE WAIVED

The third rule with respect to waiver is that jurisdictional defects cannot be cured by waiver. In MASKALL v. CHIROPRACTOR'S ASSOCIATION OF BRITISH COLUMBIA(158) a Board of the Association undertook an investigation of complaints against Maskall. Regulation 12.04 made by the Association pursuant to the CHIROPRACTIC ACT provided as follows:

> If the Board decides to investigate the complaint, the Registrar shall send a copy of the complaint to the person against whom it is made....(159)

In the British Columbia Supreme Court Aikins J. held that compliance with this provision could not be waived. It was mandatory, and compliance with it was necessary if the person in question was to have a proper opportunity to prepare a defence. According to Mr. Justice Aikins,

> If the requirement that a member against whom the complaint is made is furnished with a copy of the complaint is no more than a procedural step, and if there be a failure to take that step, then it might well be that subsequent acquiescence in the propriety of the proceedings by a member brought to a hearing would cure such procedural defect. However.... regulation 12.04 is not a matter of mere procedure but is substative and because this is so the applicant's acquiescence by in effect "pleading guilty" was ineffective to give jurisdiction where jurisdiction was lacking because of the failure to give the applicant copies of the complaints upon which he was in effect to be tried.(160)

Unfortunately, his Lordship does not clearly indicate how a "procedural defect" is to be distinguished from a substantive one. It would seem, however, that one consideration must be the degree to which the defect would hinder the preparation of a defence: to what extent would it preclude an effective hearing?(161) The courts distinguish a defect of such magnitude that there is a "real likelihood" that it will have an effect on the result from action which, while amounting to a technical breach of natural justice (or procedures prescribed by statute), does not prevent the individual concerned from making an adequate presentation of his case. A procedural defect is to be distinguished from a "mere" procedural defect. It would seem too, from the cases concerning the "non-obstructive" and the "protesting" plaintiffs that the plaintiff's degree of knowledge of his procedural rights is not an irrelevant matter.

(iii) "SOFT" EXCLUSION CLAUSES

It may be taken from the above that a contractual term purporting to exclude natural justice altogether will be of limited effect and that the circumstances in which a person will be held to have "waived" his right to fair play are few in number. What, however, is the effect of a "soft" exclusion clause, for example, one which would force the complainant to exhaust internal appeals before seeking an order in the nature of *certiorari* or a declaration?

This issue is extremely complex and no consensus has been reached either on or off the bench as to how it should be resolved. The Privy Council in WHITE v. KUZYCH allowed that the following clause could be effective:

> I promise that I will not become a party to any suit at law or in equity against this Union or the Federation, until I have exhausted all remedies allowed to me by said Constitution and By-laws.(162)

More recently, Beetz, J., for a majority of the Supreme Court of Canada, has held not only that such a clause would be effective but that, even in the absence of such a provision internal appeals would have to be exhausted before coming to the courts.(163) A strong dissent by three Supreme Court justices on a bench of seven must, however, raise some doubt as to whether this view will be adhered to in the future.(164) The majority approach would cause some difficulty in light of ~~the~~ cases concerning the "protesting plaintiff"(165) and does not adequately take into account the argument that if breach of natural justice does not render a decision a nullity the courts have no jurisdiction to interfere.

These issues are generally discussed on the bench in the context of the exercise of judicial discretion to grant the prerogative writs. A fuller discussion of internal appeals has therefore been left to Chapter 5. For the present it is sufficient to note that "soft" exclusion clauses may fall outside the area in which contractual terms will be struck down as contrary to public policy.(166)

(4) STATUTORY EXCLUSION OF NATURAL JUSTICE

(i) THE CASE FOR EXCLUSION BY CODE

Whatever limitations may exist on the exclusion of natural justice in contractual or other non-statutory situations there can be no question of any such limitations on the power of a sovereign legislature to enact any provision it may wish. The important question in the statutory area must be as to the degree of clarity and precision with which the legislature must express itself in order to exclude the principles of fair play. There would seem to be a consensus that the legislature may exclude all or some of the principles of natural justice either by express words or by necessary implication.(167) Disagreement arises, however, in seeking to define the type of legislative regime in which it will be held to be impliedly excluded.

In statutes enacted to deal with grave national emergency or great urgency it would seem reasonably clear that the princples of natural justice will be taken to have been impliedly excluded(168) at least if that is the course that strikes the judge as most reasonable in all the circumstances. The more difficult question, however, is whether statutes which outline a code of procedure for the tribunals which they create should be taken as impliedly excluding any procedural requirements which would otherwise arise from common law.

There is a substantial body of opinion to the effect that in such circumstances the maxim expressio unius, exclusio alterius operates in this way. In LABOUR RELATIONS BOARD v. TRADER'S SERVICE LTD.(169) Judson J. for a majority of the Supreme Court of Canada took the view that the board's compliance with statutory provisions was its whole duty:

> A board such as the Labour Relations Board is required to do its duty but that duty is defined by the Act and the regulations. What more can a board do in a case of this kind?(170)

Two months later a similar approach was endorsed by Martland J. speaking for the Supreme Court. In CALGARY POWER LTD. v. COPITHORNE(171) his Lordship thought that the terms of the statute were as important for what they did not include as for what they did:

> [I]t is significant that there is no requirement as to the giving of notice or the holding of any inquiry in relation to the expropriation itself, although there are specific provisions as to notice and as to arbitration proceedings in relation to the determination of the compensation to be paid in respect of the land or interest in land expropriated.(172)

An essentially similar analysis was advanced by Lord Morris in MALLOCH v. ABERDEEN CORPORATION(173) in 1971, having been adopted by a majority of that court in WISEMAN v. BORNEMAN.(174) A year later this approach formed a basis for the recommendations of a majority of the Privy Council in FURNELL v. WHANGAREI HIGH SCHOOLS BAORD.(175)

It is not proposed here to give exhaustive consideration to the authorities supporting these English decisions. That task is performed admirably in the judgments themselves as well as in several articles and case notes.(176) One point, however, is of crucial importance: in all of the above cases the judges who advocated the application of expressio unius were of the opinion that the common law principles of natural justice either had not been breached or were not applicable quite apart from the possibility of exclusion by code. Thus, in COPITHORNE it was said that the relevant determination was a "policy decision, taking into account the public interest" and was therefore unreviewable by the courts,(177) while in MALLOCH Lord Morris was of opinion that the relationship in question was in the nature of pure master-servant and that therefore natural justice did not apply.(178) In the other three cases the judges apparently supporting the expressio unius view were speaking obiter, for each of them had already determined that the proceedings in question were fair having regard to all the circumstances. Judson J.'s view in LABOUR RELATIONS BOARD v. TRADERS' SERVICE LTD. was in marked contrast with that of the court below:

> According to the judgment under appeal there was a failure to disclose the issue raised. The issue raised was perfectly plain to the union and the Board and I think it was equally plain to the respondent.(179)

Similarly, in WISEMAN v. BORNEMAN any unfairness in the statutory procedure was "more apparent than real"(180) and there was "nothing manifestly unfair about it".(181) In FURNELL'S case the majority inform us that "the scheme of the procedure gives no scope for action which can properly be described as unfair and there are no grounds for thinking that the sub-committee acted unfairly".(182)

Strictly speaking, therefore, the statements made in these judgments regarding the possibility of exclusion by code are obiter dicta. So to say does not however solve the problem. A judge is not a chameleon-like creature speaking with authority only when developing his ratio decidendi; and the quickest way to turn obiter into ratio is to litigate upon it. For this reason it is worthwhile to consider the rationale for an approach which would exclude natural justice simply because detailed procedures had been laid down in a statutory code. The cases reveal four main groups of arguments supporting this view. These relate to the COOPER v. WANDSWORTH(183) justification, the maxim expressio unius, exclusio alterius, a conviction that an appointed judiciary must pay due deference to an elected legislature, and a policy argument against unduly hindering public administration.

(a) COOPER v. WANDSWORTH

In FURNELL v. WHANGAREI HIGH SCHOOLS BOARD(184) Lord Morris asked the question:

> In the present case do the well-known words of Byles J. in COOPER v. WANDSWORTH BOARD OF WORKS (1863) 14 C.B.N.S. 180, 194 apply, viz.: "....although there are no positive words in the statute requiring that a party shall be heard, yet the justice of the common law will supply the ommission of the legislature"? Or is the code one that has been carefully and deliberately drafted so as to prescribe procedure which is fair and appropriate?(185)

Thus, where a detailed code of procedure is drawn out the argument is that there is no room to "supply the ommission of the legislature". Mullan, with characteristic clarity, has argued that "if the legislature has addressed itself to the question of procedure and made deliberate decisions, nothing has been ommitted and there is simply no room for the implication of further procedural protections by the courts".(186) This, he claims is the view that was adopted not only by the Pricy Council in FURNELL's case, but also by the House of Lords in WISEMAN v. BORNEMAN(187) and in PEARLBERG v. VARTY.(188)

With all due respect, however, it would seem that the issue is not whether or not the Legislature has laid down a procedure but rather, whether in creating a new statutory power, adequate steps were taken to ensure that it is exercised fairly. The appropriate presumption is that Parliament intends that the powers it confers are to be exercised fairly, not merely that the decision-making body should observe a statutory procedure which may or may not be comprehensive enough to ensure a standard of fair play equal to that which the common law would impose:

> It is a basic principle of natural justice that parliament is to be taken to have intended to see that justice is done and that, where the presumption arises from the circumstances, only clear words in the statute will exclude the rules of natural justice. In Furnell's case the clear words can only be found by operation of the expressio unius rule.(189)

(b) EXPRESSIO UNIUS

The rule of statutory interpretation which is usually referred to by the maxim expressio unius exclusio alterius is simply that "mention of one or more things of a particular class may be regarded as silently excluding all other members of the class".(190) Its sense is caught also by an alternative Latin tag: expressum facit cessare tacitum. This rule forms the underlying basis of the cases which lend support to the argument that natural justice may be effectively excluded by a statutory code. Perhaps surprisingly, Lord Denning M.R. has declared his willingness to so employ the rule. In MAYNARD v. OSMOND his Lordship observed that in the set of regulations relevant to the case before him there were "express provisions permitting legal representation in some circumstances: leading to the inevitable inference that it is not permitted in other circumstances...."(191)

Such an application of the maxim is, however, unjustifiable. It ignores at least two other principles of statutory interpretation and, it is submitted, is a misapplication of the expressio unius rule itself. In the first place, it allows no play to the presumption against changes in the common law. The Legislature is presumed to know the existing law and "[i]t is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistable clearness...."(192) If indeed natural justice is a rule of common law - and there is little else it can be granted that it applies in both the statutory and contractual area,(193) in situations where a statute is silent or where there is neither a contract nor a governing statute in existence(194) - there is no reason why the presumption of continuity of the law should not apply. This in essence was the view taken by Viscount Dilhorne and Lord Reid (both dissenting) in FURNELL's case where their Lordships took the view that the relevant question was "whether the regulations clearly show an intention to exclude that which natural justice would otherwise require".(195)

Viscount Dilhorne's judgment masterfully combines the presumption against alteration of the common law with the presumption that Parliament intends to act fairly so as to deny any scope whatsoever for operation of the expressio unius doctrine:

> In establishing this code of procedure in the EDUCATION ACT 1964, the intention must have been to create a code that was fair. That one is entitled to assume. No one could regard a code as fair which did not allow an accused teacher proper

> opportunities of making his defence
> to the charge preferred against him
> and yet the section makes no express
> provision for that although it does
> for his representation.(196)

Put shortly, the common law standards of natural justice will govern in the absence of express statutory exclusion.

Even if this line of argument were not sufficient to prevent the exclusion of natural justice merely by the enactment of a statutory code of procedure, there are other principles of statutory interpretation that would tend towards this result. Thus, where a statute has the effect of encroaching on the rights of the subject it will "be interpreted, if possible, so as to respect such rights...."(197) In RE "WONDERLAND" CLEETHORPES Viscount Simonds expressed his view that "[i]f there is any ambiguity about the extent of (the) derogation (by a statute from common law rights), the principle is clear that it is to be resolved in favour of maintaining common law rights unless they are clearly taken away".(198) This rule is kith and kin of the presumption against change in the law. It is not at once apparent why the "right to be heard" is not to be protected by this rule in the same way as are other common law rights. Again, and to similar effect, there is a long line of cases to the effect that "[w]here a statute confers a power.... the courts will confine those exercising the power to the strict letter of the statute".(199) This too militates strongly against permitting the expression of a statutory code of procedure to remove all the common law requirements as to fair procedure.

There would thus appear to be a weighty quantum of authority which runs contrary to the majority reasoning in the TRADER'S SERVICE,(200) COPITHORNE(201) and FURNELL(202) cases. It is submitted that if the maxim expressio unius exclusio alterius is to overcome these other principles of statutory interpretation, it must be a very powerful rule indeed. An investigation of the history and application of the maxim does indeed reveal it to be of powerful effect. Such investigation also reveals however that it is not a rule which runs in conflict with the other principles of statutory interpretation. Rather, the rules are aimed at a common end and properly applied will operate to similar effect. The purpose is to protect individual freedom and personal liberty; the effect to force the Legislature to be overwhelmingly precise if it wishes to detract from such freedoms and liberties.

In the section on expressio unius in "Maxwell on the Interpretation of Statutes",(203) all but two of the cases cited(204) show the maxim being applied to protect previously existing rights: to limit the operation of the new law to the narrowest possible area. Moreover, it has been expressly stated that the maxim will not be permitted to govern in a case in which it would "result in injustice".(205) This view was adopted by Jenkins L.J. of the English Court of Appeal in DEAN v. WIESENGRUND where his Lordship said also that

> This maxim is after all, no more than an aid to construction, and has little, if any, wieght where it is possible.... to account for the inclusio unius on grounds other than an intention to effect the exclusio alterius.(206)

It is my view, therefore, that the application of expressio unius to oust the principles of natural justice is unsupported by authority. To utilize a maxim of ancient origin which has historically been employed to defend civil liberties in such a manner as to increase the degree of arbitrariness in decision making is a perversion of the worst kind. If exclusion of fair play by statutory code is to be permitted it must be on grounds other than the parrot-like recital in a new context of a Latin maxim which has traditionally been employed for different purposes and to contrary effect.

(c) DEFERENCE TO THE LEGISLATURE

One of the most attractive arguments in favour of allowing expressio unius to operate so as to exclude natural justice is apparantly based on fundamental principles of democracy. It arises from the view that an appointed judiciary should pay due deference to a representative legislature. This concern was stated in the following terms in BRETTINGHAM - MOORE v. MUNICIPALITY OF ST. LEONARDS:

> The legislature has addressed itself to the very question and it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material.(207)

A near cousin is the view that the investigations and inquiries preceeding the passing of a statute are so extensive that the courts are not able to match the Legislatures' investigation of which procedures would be fair in all the circumstances. In

FURNELL v. WHANGAREI HIGH SCHOOLS BOARD Lord Morris said:

> It is not lightly to be affirmed that a regulation that has the force of law is unfair when it has been made on the advice of the responsible Minister and on the joint recommendation of organizations representing teachers employed and those employing. Nor is it the function of the court to redraft the code.(208)

To put the issue thus would seem to impel all true democrats to vigorous support of Lord Morris' view. There would appear to be considerable force in the argument that "the difficult and diverse problems" involved in "striking a proper balance between administrative efficiency and the provision of opportunities to be heard"(209) are best left to a State's elected representatives and that no judicial presumptions of intent should be foisted upon the Legislature.(210)

Such arguments, however, are based on the fallacious presupposition that a judge construing each statute ad hoc is better able to fathom the Legislatures' intention than one who applies in a systemmatic way the principles of statutory interpretation which have been utilized by the courts for centuries. The scope and content of natural justice are not yet so well established that ommissions should be considered as deliberate, even where the rule-making body has given considerable attention to procedure. In any event, the true meaning of Parliamentary sovereignty is that all who weild power - including the courts - must bow to the express will of the Parliament when there is a clear conflict between their practices and statutory enactment. It does not mean that every scintilla of evidence suggesting that a legislature may have wished to adversely affect rights should give rise to an undignified flurry of judicial activity aimed at suppressing existing rights and freedoms. Dicey may or may not have approved of such an approach; given the realities of modern executive government it would make Coke turn in his grave.

(d) POLICY ARGUMENTS

In LABOUR RELATIONS BAORD v. TRADERS' SERVICE LTD. there is a suggestion that policy considerations were behind the holding that the Board's whole duty was "defined by the Act and regulations". It was said that the Board had failed to disclose the issue raised despite having complied fully with the statute. Judson J. expressed his concern that

> To avoid being open to an accusation of this kind, a board engaged on such a task as this would have to open its files and send copies of every written or oral communication that it received in connection with the application. There is no such duty imposed by this Act and failure to do what is not required should not be construed as a denial of the right to be heard or a refusal of jurisdiction.(211)

This statement reflects the view which prevailed in the NAKUDDA ALI - COPITHORNE era that natural justice imposes an inflexible standard of immutable content. If a RUSSELL v. DUKE OF NORFOLK type of approach is taken then it is clear that the question which Mr. Justice Judson answered was whether the statute imposed standards higher than those which would be required by common law.(212) It is unfortunate that the question he thought he was answering was whether natural justice should be read into the statute at all. On a proper approach it is impossible for the common law requirements of fair procedure to be more stringent than is consistent with public policy.

There is, moreover, a strong argument to the effect that if exclusion by code is permitted we will soon reach the stage where all common law requirements of fair procedure are cast aside to be used only when specifically imported by statute. This has happened once before in English law and there are signs that it might occur again. In FRANKLIN v. MINISTER OF TOWN AND COUNTRY PLANNING(213) it was held that there was no room for natural justice where an administrative decision was made in accordance with a procedure outlined in statute. "This was no justification for supposing that, if no statutory procedure was prescribed natural justice was likewise excluded. But that, extraordinary as it seems, was what the courts began to hold".(214) The danger of expressio unius being transmuted to inclusion by express words only is ever present.(215) It is interesting in this context to contrast the statement in COOPER v. WANDSWORTH to the effect that the courts will supply the ommission of the legislature with certain statements in PEARLBERG v. VARTY. In that case Lord Hailsham expressed the view that the courts

> have no power to amend or supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the statute accords him. Still less is it the function of the courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment.(216)

It is submitted that the last sentence of this excerpt is in direct conflict with the overwhelming bulk of case law. Taken to its full effect it would effectively preclude the application of any common law rules of fair procedure in the statutory area.

(ii) THE CURRENT CANADIAN ATTITUDE TO EXPRESSIO UNIUS

It has been necessary to consider the rationale behind a FURNELL-type approach for three main reasons. In the first place, there are judgments of the Supreme Court of Canada which appear to be to similar effect. Secondly, the arguments are at first sight attractive, being based as they are on the words of a distinguished judge in an old case of undoubted authority, an ancient maxim, high sounding slogans of democratic principle, and rational concerns for the efficiency of State administration. Finally, there is some evidence that the FURNELL-approach does indeed represent the law of England, and if past history is any guide, the English cases are likely to be taken as too great a burden of authority for mere Canadian judges to overcome.

Happily, however, the Candian Courts do not at the present time permit expressio unius to govern in the natural justice area. In RE NICHOLSON Chief Justice Laskin, speaking for a majority of the Supreme Court of Canada, overruled the application of the maxim by the court below:

> In so far as the Ontario Court of Appeal based its conclusion on the expressio unius rule of construction it has carried the maxim much too far. This Court examined its application in L'ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD OF QUEBEC, (1953) 4 D.L.R. 161, (1953) 2 S.C.R. 140, 107 C.C.C. 183, and rejected

> an argument for its application to deny notice and hearing in that case. Rinfret, C.J.C., referred, inter alia, to the judgment of Farwell, L.J., in LOWE v. DARLING & SON (1906) 2 K.B. 772 at p. 785, where mention is made of COLQUHOUN v. BROOKS (1888), 21 Q.B.D. 52, and of the statement of Lopes L.J., at p. 65, that "the maxim ought not be applied, when its application, having regard to the subject-matter to which it is applied, leads to inconsistency or injustice". The statement commends itself to me....(217)

There is indeed an impressive array of Canadian precedent in support of Laskin's view. Thus, we have been told that in order to suspend the operation of audi alteram partem "il faut donc, dans la loi, un texte explicite a cet effet ou une inference en ayant l'equivalence"(218) and that natural justice can only be excluded by "the plainest words" of the Legislature.(219) Although the rules of fair play may be ousted by necessary implications, "'[n]ecessary' is something more than convenient or suitable, or cheaper than an alternative or expedient".(220) It means "indispensable; needful; requisite; not able to be done without; such as must be".(221)

It is to be hoped that this abundance of home-grown judicial authority will be sufficient to protect Canadian law from the temptation to import foreign cases. The correct approach here, if not in the United Kingdom, is to recognise that

> [f]or a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.(222)

A judge should, therefore, approach the question through a series of three questions. First, he would ask himself what natural justice would require apart from any statutory requirements as to procedure. Having determined this he would then consider the statutory scheme as a whole to see whether it met this standard, and if not whether the common law rules were expressly excluded. If the answer to both of the last two questions were negative the implication that natural justice applies would be made except in situations of great urgency where delay might "frustrate the apparent purpose of the legislation".

(iii) CANADIAN BILLS OF RIGHTS

If this view of the common law principles of statutory interpretation is correct, what is the effect of statutory bills of rights? Canada's federal parliament(223) and several provincial legislatures(224) have enacted statutes which purport to protect fundamental liberties, rights, and freedoms. There is, however, no constitutional limitation on the powers of the Canadian Legislatures (limitations implicit in the federal scheme excepted), bills of rights being enacted by ordinary statute only and applying only to the areas within the legislative competence of the enacting body.(225)

Nevertheless, a statute which purports to be of paramount effect can provide a powerful tool for an activist judiciary. The CANADIAN BILL OF RIGHTS(226) is such a statute, for s.2 states that

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Candian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe or to authorize the

> the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared....

Amongst the rights which it is said "shall continue to exist" are "the rights of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law" (s.1(a)). Under s.2(e) no statute unless the contrary is expressly declared is to be construed so as to "deprive a person of the right to a fair hearing in according with the principle of fundamental justice for the determination of his rights and obligations".

The statute has, however, been given a very restrictive reading and during the twenty years it has formed part of the laws of Canada only one case has arisen in which a statute has been held inoperative for conflict with the BILL OF RIGHTS.(227) It is apparently the view of the Supreme Court of Canada that

> compelling reasons ought to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its power in accordance with the tenets of responsible government which underlie the discharge of legislative authority under the BRITISH NORTH AMERICA ACT, 1867.(228)

It has been argued, however, that the CANADIAN BILL OF RIGHTS still has a useful role to play as a rule of interpetation. There have been cases in which a statute which was entirely silent as to a matter has been interpreted so as to protect civil liberties because of the Bill. In LOWRY & LEPPER,(229) BROWRIDGE,(230) and

REALE,(231) "[t]he existing laws did not deny a hearing or counsel or an interpeter (respectively) - they were silent on those points - and the Bill of Rights, employed as a rule of interpretation, enabled the court to supply the civil libertarian safeguard".(232) It will, however, be noted that in relation to natural justice the BILL OF RIGHTS performs the same function as the common law: it declares that "due process of law" and "the principles of fundamental justice" are to apply unless they are expressly excluded. This is exactly the result which is achieved if ordinary rules of statutory interpetation are employed and, while there may now be a need for express exclusion of natural justice even in emergency statutes (though this is doubtful), it is submitted that the much-vaunted BILL OF RIGHTS has little effect beyond this with regard to procedural fair play. In any event, the reluctance of the Courts to strike down provisions which run contrary to the BILL OF RIGHTS in the face of section 2 would seem to indicate that no such statute will carry the judiciary further than it wants to go. As this is the standard which in fact will be applied if the "reasonable administrator" test of natural justice is used, general statutory enactments couched in broad terms can be of little or no effect. Ultimately, the judicial community itself will decide to what extent it wishes to protect procedural rights: "to a community determined to destroy its.... important rights, it is unlikely that any statement on a piece of paper is going to deter the pursuit of that objective".(233)

Provincial Bills of Rights have not necessarily received the narrow construction which is placed upon the federal statute.

Thus, in BACHINSKY & CANTELON v. SAWYER(234) the Alberta Supreme Court considered a provincial Bill of Rights which declared "the right of the individual to.... the protection of the law".(235) Under section 2 of the Alberta Bill,

> (2) Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding The Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of the rights or freedoms herein recognized and declared.

The issue before the Court was whether detailed regulations drawn up pursuant to s.26 of THE POLICE ACT, 1973(236) could provide for a procedure contrary to natural justice. In holding that it would require the specific authority of the Act to do so, Shannon J. adopted a course which was quite different from that taken by the Supreme Court of Canada with regard to the federal statute in A. G. CANADA v. LAVELL.(237)

> But there is no reason why the Alberta courts must follow A. G. CANADA v. LAVELL in interpretating a different statute. The intention of THE ALBERTA BILL OF RIGHTS is clear; and if the decision of Shannon J. is followed in the future, it will eliminate much argument by inferior bodies that their sweeping actions are authorized by broadly worded statutes which do not contain the express disclaimer mentioned in section 2 of THE ALBERTA BILL OF RIGHTS.(238)

It would seem, therefore, that with regard to delegated legislation (if no longer to the exercise of administrative powers conferred by statute)(239) provincial Bills of Rights (if no longer the CANADIAN BILL OF RIGHTS) provide a powerful tool which the judiciary is apparently not afraid to use to strike down rules and regulations which run contrary to the common law rules of natural justice.

(5) THE NATURE OF THE DECISION MAKER

In GAIMAN v. NATIONAL ASSOCIATION FOR MENTAL HEALTH(240) Megarry J. expressed the view that "the person or body making the decision" was a factor to be borne in mind when deciding whether a duty to comply with natural justice arises. Broadly speaking, the courts have in the past accepted two limitations on their supervisory jurisdiction arising from consideration of the nature of the decision-maker. There has been a tendancy to consider disciplinary officers and bodies called upon to formulate public policy as beyond the pale.

The disciplinary exception to natural justice has been accepted in a number of English and Australian cases.(241) However, this argument was recently rejected by the Alberta Supreme Court in BACHINSKY & CANTELON v. SAWYER,(242) a case involving police force discipline. It would seem that the correct approach in Canada is that "although in some disciplinary situations it may be inappropriate for the courts to require observance of natural justice (e.g. for reasons of urgency or triviality, or on broader grounds of public policy), there is no general rule that the courts will hold themselves aloof".(243)

The exception of persons formulating policy presents a much thornier problem. It has been argued that a very wide discretionary power is unreviewable either as to merits or as to procedure used. The courts have held natural justice not to be applicable to decisions involving (amongst others) the refusal of a licence to preach,(244) the exercise of a power to give notice to dissolve partnership,(245) and a refusal to re-elect to membership of the stock exchange.(246) The exception has been applied to cases involving the immigration status of aliens,(247) public acquisition of lands,(248) recission of public contracts,(249) and the designation of an area as the site for a New Town.(250) It has operated in areas as diverse as expropriation(251) and dismissal from employment;(252) the siting of a bus stop(253) and the designation of an airport.(254)

However, the mere fact that a decision-maker is vested with a wide diescretion does not in itself justify total disregard for the principles of natural justice:

> If a discretionary power is so wide that the merits of its exercise will in practice be unreviewable, why should this fact alone exempt the repository of the discretion from any obligation to listen to representations before it acts? What has seemed obvious to many judges becomes far from obvious upon reflection. There may be sound reasons for holding that in a particular context it will be undesirable or impracticable for a court of law to engraft any procedural duty on to a wide discretionary power; but the mere fact that the discretionary power is very wide is inconclusive.... Fairness may still call for a right to a hearing (albeit a hearing different in scope and character from that accorded by a court of law) despite the fact that the ultimate decision can be based on extra-judicial considerations.(255)

Thus, the "wide discretion" argument will no longer wash with the courts when put to them by a domestic tribunal attempting to justify breach of fair procedure,(256) and even municipal governments will not be able to take themselves beyond the area of the court's supervisory jurisdiction by merely purporting to act in furtherance of public policy.(257) Indeed, recent English cases have suggested that the exercise of the royal prerogative itself is not inevitably beyond the reach of natural justice.(258)

Against this, it must be recognized that there are some decisions which are clearly unreviewable by the courts, both as to procedure and as to merits. It is inconceivable, for example, that natural justice should impose a requirement of public hearings prior to the exercise of the royal prerogative to recognise a foreign state or declare was; or that Parliament must hold hearings before passing legislation;(259) or that the Lord Chancellor should comply with natural justice before changing the scale of fees used by solicitors in conveyancing work;(260) or that a policeman must seek the opinion of a suspect he intends to arrest; or that the Attorney General of a province should hear an accused against whom an indictment is to be preferred.(261)

If the scope of this lacuna in the Court's supervisory jurisdiction is to be determined it is necessary first to seek out the reasons why the courts take the approach they do in such situations. Any rationale based on the offices held by Kings and Queens, Parliamentarians and Ministers, or policemen and Attorneys-General must be firmly rejected:

> ....To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: "Be you never so high, the law is above you".(262)

Then it is said that persons exercising "legislative" powers do not have to meet the requirements of natural justice. In BATES v. LORD HAILSHAM OF ST. MARYLEBONE Megarry J. (as he then was) said:

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy.(263)

It is not, however, the legislative form of action that determines whether or not a body is subject to the requirements of natural justice. The supreme legislature of the jurisdiction apart, no "legislative body" is immune from judicial supervision by reason of its label alone: "the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative".(264)

How then is a "legislative" nature to be identified? In his seminal 1933 article D.M. Gordon argued that all "administrative" bodies are in fact "legislative" in nature because they create rights and liabilities according to their own will. A tribunal acts legislatively if it is guided by its own wishes, having "no fixed standard to follow, but only policy and expediency"(265) and if its assessments are purely subjective. In light of this definition of "legislative" it would be fatuous to seek to justify the supposed "wide dsicretion" exception to natural justice on the ground that such powers are in fact "legislative", for the two phrases are simply alternative ways of saying that a power is exercised on the basis of subjectively perceived policy and expediency. The LIVERPOOL TAXI case(266) and RITCHIE v. CITY OF EDMONTON(267) however would seem conclusive that this alone is not sufficient to take a body beyond the ambit of natural justice. In both of those cases the municipal council's subjective analysis of the situation was unquestionnable, and yet procedural fair play was held to be requisite.

A somewhat more helpful approach was suggested by Professors Griffith and Street who would have it that

> [p]roperly understood, policy should be limited to the ultimate value judgments. There is a graduated scale of decisions at one end of which the ethical judgment is all important, and at the other end of which is a factual proposition, and all issues between are a blending of the two. Only where the normative or ethical element is relatively big in relation to the factual should there be merely political responsibility to Parliament.(268)

A similar view was adopted in a recent House of Lords case concerning local inquiries into motorway construction. Dissenting in BUSHELL v. SECRETARY OF STATE FOR THE ENVIRONMENT.(269) Lord Edmund-Davies said that an inspector should

> disallow questions relating to the merits of government policy, which involved the exercise of political judgment; but matters of fact and expertise did not become 'policy' merely because a department of government relied on them.

At the time of writing this case is reported only in THE TIMES, and the report is insufficiently complete to permit any degree of certainty on this point. It is submitted however that Viscount Dilhornes' observation that full compliance with natural justice "would not have served any useful purpose" provides a useful clue. It would seem that the "public policy" exception to natural justice applies in those situations where the policy element is so great that the effect on any person or group of persons couldn't possibly make any difference, no matter how drastic the effects might be.(270) Thus, the exercise of the royal prerogative to declare war or to recognise a foreign state is not subject to any requirement of natural justice because the needs of the political community as a whole will override any interests of individual subjects. Similarly, the decision to build a new highway is pure "policy" and is more appropriately discussed in political forums than at inquiries or in the courts. It involves the subjective assessment and balancing of the state of the economy, present and estimated transportation needs, desirable patterns of economic growth and regional development, the utility of road as opposed to rail or water transportation, and so on.

The choice of the precise location of a new road is not, however, in the same category. Here, the interests of landowners whose property is threatened with expropriation is of paramount importance. "A" may well be able to show good reason why the road should be built over "B"s land rather than his own. There may be a unique ecological niche on "A"s property which merits protection; or "A" may be able to point to sociological reasons why the road shouldn't pass through his community; perhaps cost-benefit analyses at the sub-regional scale will point to locational factors which were not at once apparant to the macro-scale planners. All of these factors may have substantial effect on the location of the highway, and it is thus appropriate that all parties affected should be heard.

(6) CONCLUSION AND SUMMARY

Having regard to the five main topics discussed in this Chapter, the direct question can be put: Is there a legally enforceable duty of fairness which lies, as Lord Loreburn would have it, "upon everyone who decides anything"? Or, have the courts recognised limits to their own supervisory jurisdiction?

The result of the foregoing investigation has been to reveal that while the Loreburn statement is too wide, the vast majority of the personswhich have from time to time been said to constitute limits to the jurisdiction of the courts in fact do nothing of the sort. It would seem that there are only two true limitations upon the court's power to enforce fair procedure. These are where there is an express or implied statutory exclusion, and where the decision to be made involves an over-whelmingly dominant policy element (see Chapter 3(4)(i) and 3(5)).

For one reason or another, the court will also refuse to interfere where the complainant has either brought on the breach himself or has knowingly acquiesced in it, and where there is a "mere" procedural defect not amounting to an excess or lack of jurisdiction. It it likely, however, that there is in fact no breach of natural justice in the first case, nor in the last, and that in the second relief is refused as a matter of judicial discretion upon consideration of public policy. (See, generally, Chapter 3(3)).

Before proceeding to a discussion of the various elements that may form a part of the content of natural justice it is perhaps worthwhile to draw together in one place the major findings of this Chapter.

THRESHOLDS

(1) A duty to act judicially arises whenever a power is exercised which affects the rights of others. "Rights" is not however to be understood in a jurisprudential sense. The word refers to all legally recognized interests, the categories of which have never been closed. (Chapter 3(1)(i)).

(2) There have, however, been cases in which a narrow view has been taken of the meaning of "rights". This approach has resulted in decisionswhich, taken at face value, are little less than absurd and in which the issues influencing the judges mind have been obscured by a terminological smoke screen (Chapter 3(1)(ii)).

(3) The current trend both in Canada and elsewhere is toward a wide view of "rights" (Chapter 3(1)(iii)). The DURAYAPPAH-GAIMAN factors may be viewed either as indicating limits to the supervisory jurisdiction of the courts or as elements to be considered in determining the appropriate content of natural justice in any given case. It was observed that the factors are of two

distinct types and that the better view is that at least those factors concerned with the quality of right are better viewed in the second way. The McINNES and MARTINEAU (#2) cases would in any event seem to establish that this is the correct approach (Chapter 3(1)(iv)).

(4) The fact that a determination is "preliminary" is not in itself conclusive. The courts will look to the realities of the situation to determine whether or not substantial interests are affected. It is the answer to this question which the judges will bear in mind in deciding whether or not exercise their power to enforce fair procedure (Chapter 3(1)(vi)).

RANGES

(5) The fact that a large number of people will be affected by a decision may be considered in determining the requirements of the duty to act fairly, but does not in itself negate its existence. The standard required is what is reasonable in all the circumstances, and where large numbers of people are affected the nature of the hearing may be modified to whatever extent is necessary to make effective administration possible (Chapter 3(2)).

CONTRACTUAL EXCLUSION

(6) Natural justice is a "fundamental rule implicit in the law of the realm" and cannot be excluded unreasonably by a term in a contract. It applies even to relations between parties who are not in a contractual relationship (Chapter 3(3)(i)).

WAIVER IN THE COURSE OF PROCEEDINGS

(7) A person will be held to have waived his right to fair play if he forces a breach by his own actions or if he deliberately fails to complain to the decision-maker at a time when it could have remedied the defect itself (Chapter 3(3)(ii)(c)(1)(2)).

(8) A mere procedural defect is waivable provided it does not actually prevent the presentation of the opposing case. However, serious procedural defects will go to jurisdiction and cannot be waived (Chapter 3(3)(ii)(c)(3)).

(9) "Soft" exclusion clauses, such as those which would force exhaustion of internal remedies before resort to the courts of common law may, in some circumstances be given effect to (Chapter 3(3)(iii)).

STATUTORY EXCLUSION

(10) There is no limitation on the power of a sovereign legislature to exclude application of the rules of natural justice by enactment. It can do this either by express words or by necessary implication. Exclusion by "necessary implication", however, refers to a very limited range of circumstances and may in effect be limited in its application to statutes passed to deal with matters of great urgency or national emergency (Chapter 3(4)(i)).

(11) The maxim expressio unius exclusio alterius has no application in the area of natural justice. It has recently been denied any operation in this area by the Supreme Court of Canada, and its application cannot be justified by reference to the COOPER v. WANDSWORTH case, the historic use of the maxim,

other principles of statutory interpretation, political arguments regarding due deference to the legislature, or policy arguments concerning the efficient operation of the machinery of state (Chapter 3(4)(i), (ii)).

BILLS OF RIGHTS

(12) The CANADIAN BILL OF RIGHTS adds nothing to the common-law protection of due process. Provincially enacted statutes may, however, operate to greater effect (Chapter 3(4)(iii)).

THE NATURE OF THE DECISION-MAKER

(13) With the exception of sovereign legislatures, any argument that the courts jurisdiction to enforce fair procedure might be ousted merely because of the nature of the decision-maker must be firmly rejected. In particular, neither disciplinary officers nor bodies entrusted with legislative functions are for that reason alone immune from judicial review of the procedures they employ (Chapter 3(5)).

(14) In some situations, however, a disciplinary officer may be excused for failure to comply with natural justice where the matter complained of is trivial or where urgent action was required (Chapter 3(5)).

(15) Although a legislative classification is not in itself conclusive, such bodies are not under an obligation to observe the procedures required by natural justice where the decision in question is of such a nature that that body's subjective analysis of what is required for the public good must

inevitably over-ride any individual interest, regardless of how important it may be (Chapter 3(5)).

CHAPTER III - FOOTNOTES

(1) BOARD OF EDUCATION v. RICE [1911] A.C. 179.

(2) The terms "threshold" and "range" are used in a sense that is borrowed from studies of the market place by economic geographers. H.W. Richardson explains their use in that context as follows:

> [A]n urban centre's main functions are to act as a service centre for its hinterland.... supplying it with central goods and services such as retail services, commercial, banking and professional services, educational, leisure and cultural facilities and urban government services. These services can be ranked into higher and lower orders depending on the demand threshold (i.e. the minimum viable level required to support the service) and the range (i.e. the outer limits of the market area for each service).

(See "Elements of Regional Economics", by Richardson, Penguin 1969, p. 88). Adapted to the present context, "threshold" refers to a minimum qaulity of interest below which, some would argue, natural justice does not - as a matter of legal definition - apply. "Range" is used to refer to the concept that any individual's right to be heard becomes nugatory as a matter of practicality after X number of people are affected.

(3) See PEARLBERG v. VARTY [1972] 2 A.E.R. 6.

(4) See RE PERGAMON PRESS LTD. [1971] 1 CH. 388.

(5) LAKE SHORE & M.S.R. CO. v. KURTZ [1894] 10 Ind. App. 60
Wesley N. Hofeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", ed. Cook, Yale University Press (1923) Chapter 1.

(7) See generally Hofeld, op. cit.

(8) ibid.

(9) 12 A.R. 505 at 526 (para. 21).

(10) de Smith, "Judicial Review of Administrative Action", 3rd edition, p. 345. The excerpt is taken from de Smith's discussion of the Lord Atkin dictum (R v. ELECTRICITY COMMISSIONERS) in his Chapter on remedies. As this dictum has been widely used in discussions of the thresholds of natural justice as well as in the context of the remedial jurisdiction of the High Courts it is submitted that it is not misapplied in

the context in which it is quoted here: see Lord Reid's analysis in RIDGE v. BALDWIN.

(11) R. v. ELECTRICITY COMMISSIONS; ex. p. LONDON ELECTRICITY JOINT COMMITTEE CO., [1924] 1 K.B. 171 at 205.

(12) NEW ZEALAND LICENSED VICTUALLERS v. PRICE TRIBUNAL [1957] N.Z.L.R. 167 at 202.

(13) de Smith first outlined his broad approach to rights in 1959 in the first edition of his "Judicial Review of Administrative Action" at p. 279.

(14) [1951] A.C. 66 at 77.

(15) Despite a long history of Commonwealth cases holding licensing to be within the scope of natural justce. See, for example, R. v. LONDON COUNTY COUNCIL, ex. p. The Entertainments PROTECTION ASSOCIATION LTD. [1931] 2 K.B. 215.
R. v. WOODHOUSE [1906] 2 K.B. 501 (reversed on other grounds in the Lords);
See generally Dr. Northey 31 A.L.J. p. 2.

(16) CALGARY POWER LTD. v. COPITHORNE [1959] S.C.R. 24 at 32. See also the approach of Quigley J. in HARVIE & GLENBOW RANCHING (supra., note 9); R. v. PAROLE BOARD, ex. p. McCAUD [1965] 1 C.C.C. 168; HOWARTH v. NATIONAL PAROLE BOARD [1974] 50 D.L.R. (3d) 349 (parole is only a "privilege" and does not amount to a "right" within Lord Atkin's dictum); MALLOCH v. ABERDEEN CORPORATION [1971] 2 A.E.R. 1278; VIDYODAYA UNIVERSITY v. SILVA (1965] 1 W.L.R. 77 (denying that there is a "right" to work which can be protected by natural justice); MITCHELL v. R. [1975] S.C.C. 61 D.L.R. (3d) 77. In MARTINEAU v. MATSQUI INSTITUTUON DISCIPLINARY BOARD 1979 (unreported), at p. 3 of the transcript, Pigeon J. seems to approve such a distinction.

(17) DOWHOPOLUK v. MARTIN [1972] 1 O.R. 311.

(18) R. v. OXFORD UNIVERSITY, ex. p. Bolchover, The Times Oct., 7, 1970.

(19) for a case demonstrating the perceived relationship between disciplinary powers and "rights" see Lord Goddard C.J.'s judgment in R. v. METROPOLITAN POLICE COMMISSIONER, ex. p. PARKER [1953] 1 W.L.R. 1150

(contra. see R. v. CITY OF MELBOURNE, ex. p. WHYTE [1949] V.L.R. 257). The case is discussed in Wade's "Administrative Law", 4th ed., pp. 440-441.

(20) P.P. Mercer, 1979, P.L. 214.

(21) supra.

(22) McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211 at 217E.

(23) This is one possible interpretation of the difficult passage in ENDERBY TOWN FOOTBALL CLUB v. F.A. [1971] 1 Ch. 591 at 606B.

(24) R. v. GAMING BOARD, ex. p. BENAIM [1970] 2 A.E.R. 528 at 533. (In SCHMIDT v. SECRETARY OF STATE FOR HOME AFFAIRS [1959] 2 Ch. 149, however his Lordship based his judgment on a rights-privileges distinction).

(25) RIDGE v. BALDWIN [1964] A.C. p. 40 at 74.

(26) [1969] 2 Ch. 149 at 170 (emphasis added). Presumably Lord Denning doesn't consider the extension of an alien's permit to stay in the country a "right or interest or some legitimate expectation". See note 24 above.

(27) The potency of "some legitimate expectation" was indicated shortly afterwards when the English Court of Appeal handed down its very important judgment in R. v. LIVERPOOL CITY CORPORATION, ex. p. LIVERPOOL TAXI FLEET OPERATOR'S ASSOCIATION [1972] 2 Q.B. 299.
See J.M. Evans, 1973 36 M.L.R. 93.

(28) BREEN v. AEU [1971] 2 Q.B. 175 at 191 A-C.

(29) It is my view that the distinction to which Lord Denning adverts is ably handled by Megarry V.C. in McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211. See discussion below.

(30) MITCHELL v. R. [1975] 61 K.L.R. (3d) 77 at 93.

(31) See: Silverstone, S. (1975) 53 C.B.R. 92; Ericson (1975) 17 Crim. L.Q. 251; referred to in Jones, D.P. (1975) 21 McGill L.J. 434.

(32) supra. note 30 at 83-84.

(33) ibid at 87.

(34) ibid at 86.

(35) Rene Dussault has pointed to the inadequacy of such an approach in his "Traite de droit Administratif", vol. 2, p. 1361: "Presentement, toutefois, la jurisprudence sur le sujet demeare tout a fait irreconciliiable: les tribunant utilisent l'appellation droit on privilege selon qu'ils diserent ou non intervenir, revelant ainsi, une fois de plus, la subjectivite excessive de leurs decisions dans le domaine du droit administratif"
This necessary subjectivity could at least be rationally dealt with if it were admitted rather than hidden behind verbal distinctions.

(36) cf. the criticisms made in the Alberta Court of Appeal of Quigley J.'s judgment in HARVIE & GLENBOW RANCHING v. CLAGARY REGIONAL PLANNING COMMISSION 12 A.R. 505 para. 23.

(37) 50 D.L.R. (3d) 349 at 363.

(38) in MITCHELL v. R. Laskin C.J. was quite explicit on this point: "The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies empowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string. What standards the statute indicates are, on the boards contentions, for it to apply according to its appreciation and without accountability to the Courts. Its word must be taken that it is acting fairly, without it being obliged to give the slightest indication of why it was moved to suspend or revoke parole."

(39) SINCENNESS - McNAUGHTON LINES LTD. v. R. [1926] Ex. C.R. 150 at 156.

(40) Perhaps it would be better to portary this as a return to an older approach. See: L'ALLIANCE DES PROFESSEURS CATHOLIQUES [1953] 2 S.C.R. 140 at 161 ("private rights or interests"); POSLUNS (1968] S.C.R. 330 ("civil conseuqences" including where there is a wide discretion. cf. Martineau (#1) [1978] 1 S.C.R. 118).

(41) LAZAROV v. SECRETARY OF STATE OF CANADA [1973].

(42) RE NICHOLSON [1978] 88 D.L.R. (3d) 671.

(43) MARTINEAU (#1) [1978] 1 S.C.R. 118.

(44) HARVIE & GLENBOW RANCHING v. CALGARY REGIONAL PLANNING COMMISSION [1978] 12 A.E. 505 para. 25.

(45) McCARTHY v. CALGARY SEPARATE SCHOOLS [1979] 1 W.W.R. 725.

(46) MARTINEAU v. MATSQUI INSTITUION DISCIPLINARY BOARD [1979] (unreported) per Dickson J., at p. 16 of transcript.

(47) ibid at p. 19.

(48) see above, text to footnote 12.

(49) Northey, 31 A.L.J. 2 at 7.

(50) [1967] 2 A.C. 337.

(51) MUNICIPAL COUNCILS ORDINANCE No. 29 of 1947 (Legislative Enactments of Ceylon, rev. 1956, c.252), as amended in 1959.

(52) It is not proposed to undertake a historical description of rights which have previously been protected by the Courts. Reasonably complete "Catalogues" of this type are to be found in most of the better-known administrative law text books. In Canada see particularly D.J. Mullan, "Administrative Law", Carswell, 19 at p.

(53) [1967[2 A.C. 337 at 349.

(54) [1971] Ch. 317.

(55) ibid at 333.

(56) ibid at 333.

(57) ibid at 333.

(58) see Mathieson 1974 N.Z.L.J. 277; Mullan 1975 25 U.T.L.J. 281; See persad 1975 P.L. 242; Taylor 1973 5 N.Z.L.J.; Taylor, 1977 3 Mon U.L.R. 191.

(59) op. cit. footnote 57 at p. 281.

(60) ibid.

(61) [1949] 1 A.E.R. 109.

(62) op. cit. footnote 57, 1977, p. 191. In (1975) 1 Mon. U.L.R. 258 at 265, Taylor indicates the "fourth" Durayappah factor over above those enumerated in the quotation of

(62) footnote 52 above: "Later Lord Devlin (sic. the judgment was read by Upjohn) adverted to the procedural elements involved in the power, thus completing the picture." It may be noted that Taylor ignores "the language of the provision" mentionned by Lord Upjohn prior to enumeration of the 3 factors. This presumably is a "fifth" Durayappah factor.

(63) per Lord Upjohn [1967] 2 Ac. 337 at 349.

(64) #1 and #5 relate to the addition or exlcusion of procedural rights by a code, #3 to the area in which breach of a prima facie duty to act judicially is excused because of the urgency of the situation, #6 to legal persons who occupy a special status in law.

(65) [1978] 3 A.E.R. 211.

(66) ibid at 217B.

(67) ibid at 217E-H.

(68) ibid at 218A.

(69) See discussion in Chapter 4 below.

(70) supra., note 64 at 219A.

(71) R. v. CRIMINAL INJURIES COMPENSATION BOARD, ex. p. LAIN [1967] 2 Q.B. 844 at 892.

(72) Wade, "Administrative Law" (4th ed. 1977) O.U.P. pp. 541-2.

(73) MARTINEAU v. MATSQUI INSTITUTION DISCIPLINARY BOARD, S.C.C. (unreported).

(74) ibid at p. 16 of transcript.

(75) see Lon Fuller, "The Morality of Law" Yale U.P. 1963.

(76) [1968] 2 W.L.R. 320.

(77) FINANCE ACT 1960 (8 & 9 Eliz. 2), c44, s.28(5).

(78) [1968] 2 W.L.R. 320 at 325H.

(79) ibid at 325B.
See also, R.E. CLARK & ONTARIO SECURITIES COMMISSION [1966] 56 D.L.R. (2d) 585; RE CHROMEX NICKEL MINES LTD. [1971] 16 D.L.R. (3d) 273; O'LAUGHLIN v. HALIFAX LONGSHOREMENS' ASSN. [1972] 28 D.C.R. (3d) 315, 342. See also, the following Canadian cases in which investigations, reports and recommendatory procedures have been distinguished from final determinations: O'CONNOR v. WALDRON [1935] A.C. 76; RE THE IMPERIAL TABACCO CO. LTD. v McGREGOR [1939] O.R. 213; ADVANCE GLASS & MIRROR CO. v. A. G. (CANADA) and McGREGOR [1950] 1 D.L.R. 488; SMITH v. MacDONALD [1951] O.R. 167 at 175, [1951] 2 D.L.R. 455 (C.A.); B.C. PACKERS LTD. v. SMITH, MACDONALD & A.G. (CANADA) [1960] 28 D.L.R. (2d) 711 [cases concerning combines investigation.]

ST. JOHN v. FRASER [1935] S.C.R. 441 (investigation into securities by apppointee of the provincial A.G.).

RE YORK T.W.P. BY-LAW [1942] O.R. 582 [investigation by provincial municipal board culminating in a report on adjustment of municipal notes.]

R. v. BOARD OF BROADCAST GOVERNORS: ex. p. SWIFT CURRENT TELECASTING CO. [1962] O.R. 190; [1962] O.R. 657 (C.A.). [hearings by Board of Broadcast Governors prior to making recommendations to the Minister of Transport.]

GUAY v. LAFLEUR [1965] S.C.R. 12; RE LOW & M.N.R. [1966] 2 O.R. 455; [1967] 1 O.R. 135 (C.A.) [inquiries pursuant to the INCOME TAX ACT (Canada).]

R. v. DEPUTY POSTMASTER GENERAL: ex. p. BENOIT [1966] 1 O.R. 39 [investigation of conduct of a civil servant.]

R. v. SASKATCHEWAN COLLEGE OF PHYSICIANS & SURGEONS; ex. p. SAMUELS [1966] 58 D.L.R. (2d) 622 (Dask Q.B.) [investigation by the preliminary inquiry committee of the College into alleged misconducts. cf. however, RINGROSE v. COLLEGE OF PHYSICIANS & SURGEONS [1978] 8 A.R. 113 where the recommendatory character of the committee was not considered relevant.]

BALDWIN v. POULOIT [1969] S.C.R. 576 [investigation of alleged misconduct by a pilotage authority.]

It will be noted that none of the above cases, cited in the 1978 edition of Reid & Davids "Administrative Law and Practice" post-dates Canadian acceptance of "Fairness" or RIDGE v. BALDWIN.

(80) [1971] A.C. 297 at 317C.

(81) ibid at 317E.

(82) ibid 317F. For the opinions of other members of the Lords (whose views were similar to Wilberforce's) see 309G-310A (Lord Morris of Borth-y-Gest); 311E (Lord Guest); 314H, 316F (Lord Donovan).

(83) per Lord Reid, ibid 308B.

(84) PEARLBERG v. VARTY (INSPECTOR OF TAXES) [1972]. 1 W.L.R. 534.

(85) [1973] A.C. 660.

(86) [1969] S.C.R. 678 as interpreted by Dickson J. in HARELKIN v. UNIVERSITY OF REGINA 26 N.R. 364 at 412.

(87) cf. R. v. ST. LAWRENCES HOSPITAL STATUTORY VISITORS [1953] 1 W.L.R. 1158; GUAY v. LAFLEUR [1965] S.C.R. 12. This analysis is inadequate with regard to the problem of instituional bias. See D.P. Jones 1977) 23 McGill L.J. 605.

(88) [1975] 50 D.L.R. (3d) S.C.C. 349 at 361.

(89) "Judicial Review of Administrative Action" (3d ed.).

(90) Dussault has expressed his view on the matter in closely similar terms: "Les tribunaux estiment generalement qu'un agent au une autorite, que ne decide pas en dernier ressort et de facon definitive le droit des parties, n'a pas a respecter la regle Audi alteram partem." (at p. 1366 of "Traite de droit administratif"). See also RE CLARK & ONTARIO SECURITES COMMISSION [1966] 56 D.L.R. (2d) 585; RE CHROMEX NICKEL MINES LTD. [1971] 16 D.L.R. (3d) 273; O'LAUGHLIN v. HALIFAX LONGSHOREMENS' ASSOCIATION [1972] 28 D.C.R. (3d) 315, 342.

(91) per Lord Hailsham, PEARLBERG v. VARTY [1972] 1 W.L.R. 534 at 539.

(92) [1979] 1 S.C.R. 495 at 508.

(93) [1978] 12 A.R.

(94) Per Milvain C.J. see 12 A.R. 31 at 41 (para. 31).

(95) [1979] 1 W.W.R. 725.

(96) R. v. RACE RELATIONS BOARD, ex. p. SELVARAJAN [1975] 1 W.L.R. 1686.

(97) Any other conclusion would seem to be inconsistent with the Supreme Court of Canada decision in SAULNIER v. QUEBEC POLICE COMMISSION [1975] 1 S.C.R. 572. Commented on by D.P. Jones, 53 C.B.R. [1975] 802 at 805; DUSSAULT, "Traite de droit administratif", 1367, footnote 650.

(98) H.W.R. Wade "Administrative Law" (4th ed.) O.U.P. p. 482. (emphasis added).

(99) BOARD OF HEALTH FOR SALTFLEET T W N P v. KNAPMAN [1956] 6 D.L.R. (2d) 81.

(100) WISWELL v. WINNIPEG CORPORATION [1965] S.C.R. 512.

(101) Taylor, G.D.S., (1977) 3 Mon. U.L.R. 191 at 209.

(102) de Smith, S.A. (1973) "Judicial Review of Administrative Action", London, STEVENS & SONS LTD., at p. 168. Strictly read in context, de Smith's statement refers only to the audi alteram partem rule. It is possible therefore, that he sees the range as going to content rather than supervisory jurisdiction, i.e. preserving nemo judex while holding the content of audi alteram partem to be minimal in the circumstances. It seems more likely, however, that Professor de Smith would adhere to the view of Lord Morris in MALLOCH v. ABERDEEN CORPORATION [1971] 2 A.E.R. 1278 at 1288 that it would be a "hollow and barren manifestation of natural justice" to grant a hearing without the knowledge of the case to be met. A fortiorari, de Smith would surely doubt that there could be a duty to comply with natural justice without any hearing whatsoever.

(103) see supra., footnote 2.

(104) It may go to standing. This area too is opening up considerably. See BLACKBURN v. A.G. [1971] 1 W.L.R. 1037; R. v. COMMISSIONER OF POLICE, ex. p. BLACKBURN [1968] 2 Q.B. 118; A.G. ex rel McWHIRTER v. I.B.A. [1973] Q.B. 629; GOURIET v. U.P.O.W. [1978] A.C. 435 at 483; RE ISLAND RECORDS [1978] 3 W.L.R. 23; THORSON v. A.G. OF CANADA [1974] 43 D.L.R. (3d) 1; NOVA SCOTIA BOARD OF CENSORS v. McNEIL [1975] 5 N.R. 43. See Mullan, D.J., (1976) 8 Ott. L.R. 32.

(105) [1978] A.C. 435 at 483.

(106) Mathieson, D.L. (1974) N.Z.L.J. 277 at 283.

(107) per Lord Reid in RIDGE v.BALDWIN]1964] A.C. 40 at 64.

(108) [1960] 24 D.L.R. (2d) 753. This, interestingly enough, is the sole case on which de Smith relies in support of his statement quoted above (text to footnote 102). Verchere J. does expressly approve the de Smith view at 759, but it would seem that the ratio of the case turns on the former need of a super-added duty to act judicially. Verchere J. held that this did not exist in the present case because "neither the employer nor any other person incidentally affected by the action of the Board other than the claimant could be considered as a "party" in these proceedings". (at 759).

(109) ibid at 757.

(110) ibid at 759.

(111) [1964] N.Z.L.R. 689.

(112) ibid at 698.

(113) ibid at 698-99. The emphasis is added.

(114) see BOARD OF EDUCATION v. RICE, [1911].
LOCAL GOVERNMENT BOARD v. ARLIDGE [1915].
GENERAL MEDICAL COUNCIL v. SPACKMAN [1943].

(115) DAWKINS v. ANTROBUS XVII Ch. Div. 615 at 623 per Jessel M.R.; RUSSELL v. DUKE OF NORFOLK [1949] 1 A.E.R. 109 at 118C, per Tucker L.J., BIMSON v. JOHNSTON [1957] 10 D.L.R. (2d) 11 at 25, per Thompson J. (approved by the Ontario C.A. in 12 D.L.R. (2d) 379); MACLEAN v. WORKER'S UNION [1929] A.E.R. 469; GUINANE v. SUNNYSIDE BOATING CO. OF TORONTO [1893] 21 O.A.R. 49.

(116) KANE v. UNIVERSITY OF BRITISH COLUMBIA, [1980] (unreported, S.C.C.) per Dickson J. at p. 6 of transcript.

(117) in ANDREWS v. SALMON (1888] W.N. 102 at 103.

(118) [1920] 2 K.B. 523.

(119) ibid at 535.

(120) [1951] 3 D.L.R. 641 at 648, per Viscount Siron.

(121) LEE v. THE SHOWMENS' GUILD OF GREAT BRITAIN [1952] 2 Q.B. 329 at 341, per Denning L.J.

(122) ibid at 354.

(123) see, for example, BIMSON v. JOHNSTON (supra., note 111); POSLUNS v. TORONTO STOCK EXCHANGE [1968] S.C.R. Indeed, it is likely that the Canadian courts never really shared the doubts of Viscount Simon in WHITE v. KUZYCH (supra., note 120): see the B.C.C.A. in that case, [1950] 4 D.L.R. 187; and LOCAL 1571 I.L.A. v. INTERNATIONAL LONGSHOREMEN'S ASSN. [195]] 3 D.L.R. 50.

(124) and, indeed, a contract if that were necessary.

(125) BELAND v. L'UNION ST. THOMAS [1890] 19 O.R. 474; GRAVEL v. L'UNION ST. THOMAS [1893] 24 O.R. 1; RICHELIEU & ONTARIO NAVIGATION CO. v. UNION ASSURANCE [1894] Q.R. 410; LAPORTE v. MONTREAL POLICE BENEFIT ASSN. [1906] A.C. 535; BONANZA CREEK HYDRAULIC CONCESSION v. R. [1908] 40 S.C.R. 281; CANADIAN BROTHERHOOD OF RAILROAD EMPLOYEES v. MOORE [1921] 20 O.W.N. 64.

(126) supra., note 119.

(127) supra., note 119. The Supreme Court of Canada expressly approved the judgment of the Ontario High Court. see per Gale J. in 46 D.L.R. (2d) 289 at 292.

(128) per Thompson J. in BIMSON v. JOHNSTON, supra., note 119 at 24.

(129) supra., note 117 at p. 342.

(130) 17 Ch. Div. 615 at 630. See also WOOD v. WOAD [1894] L.R. 9 Ex. 190 at 196, per Kelly C.B.; WEINBERGER v. INGLIS [1919] A.C. 606, 616, per Lord Birkenhead L.C. cf. MACLEAN v. WORKER'S UNION [1929] 1 Ch. 602, 625,

(131) 19 O.R. 747 at 750.

(132) 10 D.L.R. (2d) 11 at 25.

(133) 12 D.L.R. (2d) 379 at 380.

(134) 30 D.L.R. (2d) 82 at 88 and 90.

(135) 31 D.L.R. (2d) 441 at 447.

(136) 41 W.W.R. 48 at 53.

(137) 12 A.R. 338 at para. 23.

(138) see PETT v. GREYHOUND RACING ASSOCIATION (#1) [1969] 1 Q.B. 125; ENDERBY TOWN FOOTBALL CLUB v. THE FOOTBALL ASSOCIATION [1971] Ch. 591.

(139) supra. at 24.

(140) ibid.

(141) see McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211; ROPER v. ROYAL VICTORIA HOSPITAL [1975] 2 S.C.R. 62 (possibly governed by statute); H.W.R. Wade's comment on R. v. ASTON UNIVERSITY, ex. p. ROFFEY [1969] 2 Q.B. 538 in 85 L.Q.R. 468.

(142) [1850] 2 Mac & G. 216 at 222.

(143) [1881] 17 Ch. Div. 615 at 628.

(144) [1964] 47 W.W.R. 81 at 88.

(145) [1972] F.C. 469 at 487 - 88.

(146) [1979] 26 N.R. 364.

(147) DE VERTEUIL v. KNAGGS [1918] A.C. 557 at 560 - 561, per Lord Parmoor.

(148) LEE v. SHOWMEN'S GUILD [1952] 2 Q.B. 329 at 343 per Denning L.J.

(149) supra.

(150) supra.

(151) [1958] S.C.R. 672.

(152) ibid at 677.

(153) [1964] 47 W.W.R. 81.

(154) [1972] F.C. 469.

(155) R.S.C. 1970 c.P.-14.

(156) supra. at 481.

(157) ibid. There is, however, some doubt in this case as to whether the Board was the appropriate body to complain to of breach of the statutory notice requirements. See Thurlow J. at 487: "Such a waiver is in my opinion to be implied whenever the person affected, with knowledge of the facts, takes a course which is not consistent with his exercise of his right to have the order voided by competent authority on the ground of failure to comply with the statutory requirement and in my view the requests of the applicants for reference of the matter to a Board of Review... were...effective waivers of the applicant's rights to object to the timeliness of the notices." It would seem that Medi-Data should have complained of the breach to the Postmaster General.

(158) [1967] 62 W.W.R. 129.

(159) R.S.B.C. 1960 Ch, 54.

(161) ibid see p. 133

(162) [1951] 3 D.L.R. 641 at 645

(163) HARELKIN v. UNIVERSITY OF REGINA [1979] 26 N.R. 364

(164) ibid at 398 ff. per Dickson J.

(165) supra. at p. 111

(166) On any view however it is doubtful that they would be permitted it "rights" are seriously affected during the interim period. A significant fact in WHITE v. KUZYCH [1951] 3 D.L.R. 641 at 644 was that under the Trade Union regulations "If expulsion has been the penalty, an appeal shall stay the order until decision by the Appellate Tribunal...."

(167) See, for example, EVANS, J.M., 36 M.L.R. 439 at 441 and NORTHEY, J.F., 6 N.Z.U.L.R. 59 at 62. (QUARE) Whether the new formulation of the law makes it more difficult for a legislature to achieve an effective privitive clause. ANISMINIC v. F.C.C.]1969] 2 A.C. 147 makes it difficult to envisage any form of words which will totally oust the jurisdiction of the courts (see, however, s. 34 (2) or the B.C. LABOUR CODE, R.S.B.C. 1979 Ch. 212.) In Alberta a municipality once sought to free itself from the duties of natural justice

in the exercise of certain powers by lobbying the Legislature to insert a section deeming municipalities to operate "legislatively" in exercising those powers. The effectiveness of any such clause cannot, however, outlive the classificatory approach to the applicability of natural justice.

(168) see Wade, H.W.R., "Administrative Law". 4th ed. at 451. See DE VERTEUIL v. KNAGGS [1918] A.C. 557. It is, however, precisely in this type of situation that the legislature is most likey to expressly state its intention that audi alteram partem and nemo judex be ecluded. see REID & DAVID, "Administrative Law and Practice", 2nd ed. at p. 36.

(169) [1958] S.C.R. 672.

(170) ibid at 677.

(171) [1959] S.C.R. 24.

(172) ibid at 33.

(173) [1971] 2 A.E.R. at 1278 at 1287F.

(174) [1971] A.C. 297.

(175) [1973] 2 W.L.R. 92.

(176) EVANS, J.M. (1973) 36 M.L.R. 439; DR. J.F. NORTHEY (1972) N.Z.L.J. 307, (1974) 6 N.Z.U.L.R. 59; G.D.S. TAYLOR (1973) 5 N.Z.U.L.R. 373.

(177) [1959] S.C.R. 24 at 33. The idea that "policy" decisions are unreviewable was recently affirmed by the House of Lords in BUSHELL v. SECRETARY OF STATE FOR THE ENVIRONMENT, The Times, 12/2/1980. See discussion in Chapter 3(5) below.

(178) [1971] 2 A.E.R. 1278 at 1287E and 1288F. See, however, the discussion above in Chapter 2(2).

(179) [1958] S.C.R. 672 at 677.

(180) [1971] A.C. 297 at 315G per Lord Donovan.

(181) [1971] A.C. 297 at 311G per Lord Guest.

(182) [1973] 2 W.L.R. 104 at 108C per Lord Morris.

(183) [1863] 14 C.B.N.S. 180.

(184) [1973] 2 W.L.R. 92.

(185) ibid at 105C.

(186) MULLAN, D.J. (1975) 25 U.T.L.J. 281 at 310.

(187) supra.

(188) [1972] 1 W.R.L. 534.

(189) Taylor, G.D.S. [1973] 5 N.Z.U.L.R. 373 at 376.

(190) MAXWELL ON THE INTERPRETATION OF STATUTES, 12th ed. by P. St. J. Langan, London, Sweet and Maxwell, (1969) at p. 293.

(191) [1977] Q.B. 240 at 253F. Note, however, the comments on this case by W.A. McKean (1977) C.L.J. 205.

(192) see MAXWELL, op. cit. at 116. In ESQUIMALT AND NANAIMO RY. CO. v. FIDDICK [1909] 14 B.C.R. 412, 11 W.L.R. 509 (C.A.) it was said: "Every statute or rule conferring on any tribunal be that tribunal the Lieutenent-Govenor in Council, a municipal council or the committee of a club, authority to adjudicate upon matters involving civil consequences to individuals, should be construed as if words stipulating a fair hearing to all parties had been inserted therein. The legislature omits them as unnecessary, knowing that the courts will read these words into the Act."

(193) see above.

(194) e.g. Megarry's "application" cases. Se McINNES v. ONSLOW FANE [1978] 3 A.E.R. 211. e.g. cases involving exercises of the Royal Prerogative - see LAKER AIRWAYS LTD. v. DEPARTMENT OF TRADE. [1977] Q.B. 643.

(195) supra. at 111G.

(196) ibid at 112H.

(197) MAXWELL, op. cit. at 251.

(198) [1965] A.C. 58 at 71.

(199) MAXWELL, op. cit. at 258.

(200) supra.

(201) supra.

(202) supra.

(203) op. cit. at 293. Interestingly enough, this section occurs in Chapter 12, headed "Subordinate Principles."

(204) the exceptions are R. v. MIDLAND RY. CO. [1855] 4 E & B 958; CRAYFORD OVERSEERS v. D & C RUTTER [1897] 1 Q.B. 650. In both cases the maxim had to be applied in the way it was in order to give the statutes in question any meaning at all.

(205) COLQUHOUN v. BROOKS [1888] Q.B.D. 52 at 65, per Lopes L.J.

(206) [1955] 2 Q.B. 120 at 130.

(207) [1969] 121 C.L.R. 509 at 524.

(208) supra. at 105D.

(209) EVANS, J.M. (1973) 36 M.L.R. 93.

(210) see NORTHEY, J.F. (1972) N.Z.L.J. 307.

(211) [1958] S.C.R. 672 at 677.

(212) see Chapter 2(3) above.

(213) [1948] A.C. 87.

(214) Wade, H.W.R., "Administrative Law", 4th ed. 1978, p. 439.

(215) such an approach is advocated by Dr. Northey in (1972) N.Z.L.J. 307.

(216) [1972] 1 W.L.R. 534 at 540.

(217) [1979] 88 D.L.R. (3d) 671 at 678.

(218) L'ALLIANCE DES PROFESSEURS CATHOLIQUES v. L.R.B. [1953] 2 S.C.R. 140 at 166, per Fateux J.

(219) BOARD OF HEALTH FOR SALTFLEET TOWNSHIP v. KNAPMAN [1956] 6 D.L.R. (2d) 81 at 83 per Cartwright J. (for the Supreme Court of Canada).

(220) COPITHORNE v. CALGARY POWER [1957] 22 W.W.R. 406 at 425, per Porter J.A.

(221) ibid. Other cases adopting a view similar to that propounded by Laskin C.J.C. in NICHOLSON include: CAMAC EXPLORATION v. OIL AND GAS CONSERVATION BOARD OF ALBERTA [1964] 47 W.W.R 81 at 86 (Alta. S.C. - Chambers); HOWARTH v. N.P.B. [1975] 50 D.L.R. (3d) 349 at 363 (S.C.C.); HARVIE & GLENBOW RANCHING v. CALGARY REGIONAL PLANNING COMMISSION [1978] 12 A.R. 505 at 31 (Alta. C.A.); KANE v. U.B.C. [1980] unreported S.C.C. at p.7 of transcript of Dickson J.'s Judgement; RE KUCY & McCALLUM [1944] 1 W.W.R. 361 at 369 (Alta. S.C. - A.D.); LABOUR RELATIONS BOARD v. TRADERS' SERVICE LTD. [1958] S.C.R. 672 at 687 and 688. (per Locke J., dissenting in the S.C.C.); TORONTO NEWSPAPER GUILD v. GLOBE PRINTING [1953] 2 S.C.R. 18 at 38 (S.C.C.).

(222) per Lord Reid (disagreeing with his brethern on this point) in WISEMAN v. BORNEMAN [1971) 297 at 308C.

(223) THE CANADIAN BILL OF RIGHTS, 1960, (Can.) c. 44 R.S.C. 1970 Appendix III.

(224) The provincial statutes are as follows: THE ALBERTA BILL OF RIGHTS, 1972 (Alta.) c.1. (also, THE INDIVIDUAL'S RIGHTS PROTECTION ACT, 1972 (Alta,) c.2, s.1. THE SASKATCHEWAN BILL OF RIGHTS ACT, 1947 (Sask.) c. 35 (which does not, however, purport to have overriding effect on inconsistent legislation). QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS, 1975 (Que), c.6.

(225) subject however to the theory on an "implied Bill of Rights" contained in Canada's basic constitutional document, the BRITISH NORTH AMERICA ACT, 30 & 21 Vict. c.3. see the approach of Rand and Abbot J.J. in SWITZMAN v. ELBLING & A.G. for QUEBEC [1957] S.C.R. 285.

(226) supra.

(227) see R. v. DRYBONES [1970] S.C.R. 282.

(228) CURR v. R [1972] S.C.R. 889, 899, per Laskin, J.

(229) LOWRY & LEPPER v. R. [1974] S.C.R. 195.

(230) BROWNRIDGE v. R. [1972] S.C.R. 926.

(231) A.G. ONT. v. REALE [1975] 2 S.C.R. 624.

(232) HOGG P.W., "Constitutional Law in Canada" (1977) THE CARSWELL COMPANY LTD., Toronto, p. 443.

(233) CHEFFINS, R.I. and TUCKER, R.N. "The Constututional Process in Canada" (2d ed.) 1976 McGRAW-HILL RYERSON LTD., Toronto, p.]9.

(234) [1974] 1 W.W.R. 295 (Alta. S.C.).

(235) R.S.A. 1972 c.1.

(236) R.S.A. 1973 c.44.

(237) [1974] S.C.R. 1349.

(238) JONES, D.P., 21 McGill, L.J. (1975) 156 at 159.

(239) see discussion supra., Chapter 3(4) (i)-(ii).

(240) [1971] Ch. 317.

(241) Ex. p. DEATH [1852] 18 Q.B.D. 647 (university students); PARKER'S case [1953] 1 W.L.R. 1150, 1155 (taxi drivers); Ex. p. FRY [1954] 1 W.L.R. 760 (Div. Ct.) (Firemen); BUCKOKE v. G.L.C. [1971] Ch. 655, 659-662 (per Plowman J.), but cf. (1971) h. at 669, per Lord Denning, M.R.; FRASER v. MUDGE [1975] 1 W.L.R. 1132.

(242) [1974] 1 W.W.R. 295 (Alta. S.C.)

(243) de Smith, S.A. "Judicial Review of Administrative Action". 3d ed. p. 171.

(244) ABERGAVENNNY (MARQUIS) v. LLANDAFF (Bishop) [1888] 20 Q.B.D. 460.

(245) RUSSEL v. RUSSEL [1880] 14 Ch. D, 471.

(246) CASSEL v. INGLIS [1916] 2 CH. 211.

(247) VENICOFF'S case [1920] 3 K.B. 72; SOBEN'S case [1963] 2 Q.B. 243; SCHMIDT'S case [1969] 2 Ch. 149.

(248) HUTTON c. A.G. [1927] 1 Ch. 427; LAFFER v. GILLEN [1927] A.C. 886.

(249) BOUGAUT BAY CO. v. COMMONWEALTH [1927] 40 C.L.R. 98.

(250) FRANKLIN v. MINISTER OF TOWN AND COUNTRY PLANNING [1948] A.C. 87.

(251) CALGARY POWER LTD v. COPITHORNE [1959] S.C.R. 24.

(252) VIDYODAYA UNIVERSITY COUNCIL v. SILVA [1965]] W.L.R. 77.

(253) B.P. AUSTRALIA LTD. v. GOLD COAST CITY COUNCIL [1967] Qd. R. 307.

(254) ESSEX C.C. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT [1967] 66 L.G.R. 23.

(255) de Smith, S.A., "Judicial Review of Administrative Action", 3d. ed. p. 163-4.

(256) GAIMAN v. NAMH [1971] Ch. 317.

(257) RITCHIE v. CITY OF EDMONTON (The Alberta Hotel case), unreported judgment of the Alberta Queen's Bench, 17 January, 1980.

(258) LAKER AIRWAYS LTD. v. DEPT. TRADE [1977] Q.B. 643.

(259) EDINBURGH & DALKEITH RY. v. WAUCHOPE [1842] 8 Cl. & F. 710, 720 per Lord Brougham; B.R.B. v. PICKIN [1974] A.C. 765.

(260) BATES v. LORD HAILSHAM [1972] 2 A.E.R. 1019.

(261) see R. v. MORGENTALER [1973] Que. S.C. 824.

(262) GOURIET v. U.P.O.W.[1978] A.C. 435, per Lord Denning M.R.

(263) [1972]] W.L.R. 1373.

(264) ibid.

(265) (1933) 49 L.Q.R. 94 at 110.

(266) [1972] 2 Q.B. 299.

(267) unreported decision of Stevenson J. of the Alberta Queen's Bench, 17 January, 1980.

(268) GRIFFITH, J.A.G. and STREET, H., "Principles of Administrative Law" 5th ed. (1973), PITMAN PUBLISHING, Bath. cf. the distinction made by the Franks Committee [Cmnd. 218 (1957)] between evidence of a general nature (policy) and evidence of a specific character (not policy).

(269) The Times, 12/2/80.

(270) see also, LAKE DISTRICT SPECIAL PLANNING BOARD, v. SECRETARY OF STATE FOR THE ENVIRONMENT, The Times, 18/2/75.

CHAPTER IV - THE CONTENT OF FAIR PROCEDURE

> "[A]lthough the question of whether the principles of natural justice have been complied with in any given case is an issue of law, nevertheless it rests in each instance on the particular facts."
> -Mr. Justice Gale, 1966(1)

In Chapter I above it was said that natural justice imposes a procedural standard which is variable according to a test that seeks to balance administrative efficiency against the need that justice be done.(2) In Chapter II the flexibility of natural justice was re-emphasized and it was argued that those cases which have spoken of a "minimum content" of natural justice belong to an earlier era of legal history.(3) The bulk of the immediately preceding Chapter was dedicated to arguing that a number of factors which have from time to time been said to limit the supervisory jurisdiction of the courts are more appropriately viewed as elements to be weighed in determining the appropriate content of natural justice in any given case. It was said that the content of the duty was that which the "reasonable adminstrator" would feel struck a sensible balance between fairness and administrative efficiency.(4)

An essentially similar view has been expressed in a number of cases of high authority. The "reasonable adminstrator" standard was expressly endorsed by Lord Reid in RIDGE v. BALDWIN,(5) and in CEYLON UNIVERSITY v. FERNANDO(6) it was said that while "quasi-judicial" bodies may adopt their own rules of procedure, this freedom extends only so far as those rules are fair having regard to the circumstances. A "pragmatic approach" was endorsed by the Alberta Court of Appeal in HARVIE & GLENBOW RANCHING v. CALGARY REGIONAL PLANNING COMMISSION(7) and in MARTINEAU v. MATSQUI INSTITUTION DISCIPLINARY BOARD, Dickson J. expressed the view that the content of natural justice applicable in any given case could be determined by a single question: "Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved?"(8) The answer to this question is to be found by consideration of a number of "counter-balancing factors"(9) and the duty lying upon the decision-maker is to use a procedure which strikes "a balance between the need for expedition and the need to give a full opportunity to the defendant to see the material against him"(10) and to present his arguments.

The sort of factors which must be weighed in this balancing test is apparent from the discussion in Chapter 3 above. In RUSSELL v. DUKE OF NORFOLK, Tucker L.J. was of the opinion that

> [t]he requirements of natural justice must depend on the circumstances of the case,(11) the nature of the inquiry,(12) the rules under which the tribunal is acting, the subject matter that is being dealt with,(13) and so forth.(14)

This formulation was expressly approved by a majority of the Supreme Court of Canada in KANE v. THE BOARD OF GOVERNORS OF THE UNIVERSITY OF BRITISH COLUMBIA.(15) A more elaborate list is to be found in DURAYAPPAH v. FERNANDO.(16) This enumeration was adopted by the Canadian Supreme Court in MINISTER OF NATIONAL REVENUE v. COOPERS & LYBRAND.(17)

Common to every formulation is the desire to weigh administrative efficiency against the seriousness of the consequences to the individual. Factors such as urgency, secrecy, national security, the number of people affectd, and so on, are relevant on the "administrative efficiency" side of the equation. The factors affecting the seriousness of the consequences to the individual are more difficult to enumerate, though "rights" to property, liberty, livelihood and good reputation have been rigourously protected in the past. Megarry J. attempted to classify other interests by dividing cases into "application". "expectation", and "forfeiture" categories in McINNES v. ONSLOW FANE.(18) In considering the "type of decision" in question his Lordship said:

> I do not suggest that there is any clear or exhaustive classification; but I think that at least three categories may be discerned. First, there are what may be called the forfeiture cases. In these, there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a license is revoked. Second, at the other extreme there are what may be called the application cases. These are cases where the decision merely refuses to grant the applicant the right or position he seeks, such as membership of the organization, or a license to do certain acts. Third, there is an intermediate category, which may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happended that his application will be granted.(19)

However, no matter how complete the enumeration of relevant factors, no matter how comprehensive the taxonomy adopted by the courts, the appropriate content of natural justice is and will remain an issue for subjective assessment on the facts of each individual case: "The differing concatenation of statutory provisions and factual circumstances in each case makes stare decisis of diminishing assistance in determining the justice of another case".(20)

For the lawyer or administrator attempting to determine in advance of litigation the standard of procedure which the common law will apply in any given case this provides a disconcertingly imprecise standard. Nevertheless, a knowledge of the factors which are considered important by the courts coupled to a familiarity with the spirit in which they approach natural justice problems provides guidance in the administrative law area which is equal to that provided by common law tests used in other fields:

> The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the courts is much more definite than that.(21)

The present Chapter will attempt to demonstrate how the "balancing test" is used by the courts to determine the appropriate content of natural justice in any given case. It will focus on the weight which is given to the varying factors in particular cases and the "spirit" rather than the "letter" of the common law of fair procedure. In his casebook, "The Administrative Process",(22) Professor F.A. Laux has distilled ten "rights" which form part and parcel of the right to be heard by a disinterested judge: the rights to notice, to examine reports and other secret evidence, to particulars, to adjournment, to cross-examination, to counsel, to open court, to be heard by the person who decides, to know reasons for the decision, and to have a disinterested and unbiased judge. These will be considered in turn in order to illustrate the circumstances which the courts consider significant in deciding what the appropriate content of natural justice involved in any particular case. The "right" to an oral hearing will also be discussed.

(1) NOTICE

Audi alteram partem imports a duty which is greater than merely a requirement that administrators must hear any interested party who may happen to present himself before the decision-maker A positive onus lies upon persons exercising powers affecting others. They must take reasonable steps to ensure that those affected are aware of both the issues raised and of when and where they may present their side of the case. The right to notice is seen as an essential part of natural justice without which there cannot truly be said to be any opportunity to be heard at all.

In RE CHILD WELFARE ACT: WALTERS v. PHILLIPS, Adamson C.J.M. was of the view that

> [t]he right of the subject to notice, and and the right to be heard before his liberty, property rights or family rights are disposed of by judicial proceedings, is fundamental to our jurisprudence. On this right the reign of law is founded. Under our system there can be no adjudication between parties without notice of the proceedings.(23)

"Notice" in this context really refers to two rights: a right to know the time, date, and place of the hearing (or the means by which representations might be made) and a right to know the case to be met. In one recent case Moir J.A. of the Alberta Court of Appeal expressed the view that the respondents "were entitled to notice of the hearing, to have the precise offence with which they were charged set out...."(24) There is , however, no absolute standard either with regard to the amount of advance warning nor as to how precisely the case against must be outlined: "All that is required is that reasonable notice be given, with the grounds of the complaint, and that a reasonable opportunity to answer the allegations against him be afforded."(25)

Exactly what is reasonable notice will depend upon the circumstances of the particular case and will vary according to the seriousness of the issue, the number of persons affected and the degree of their sophistication, the complexity of the issues, the amount of time reasonably required to prepare an argument, the sensitiviity of the matter, the need to protect sources and so so. In RICHELIEU & ONTARIO NAVIGATION CO. v. COMMERCIAL UNION ASSURANCE CO. the Quebec Queen's Bench annulled an insurance arbitration decision on the basis that the appellants had not been given a reasonable time to prepare their case. Lacoste, J.C., expressed the principle applicable as follows:

> Si donc une cour de justice arrive a la conclusion qu'une des parties a ete prise par surprise et n'a pas pu faire valoir ses pretentions, et que les arbitres n'ont pas adjuge en connaissance de cause, il me semble alors du devoir des juges de mettre de cote la sentence arbitrale. Agir autrement serait consacrer un deni de justice.(26)

The amount of notice given in this case was clearly inadequate on the facts: a complex question of valuation was involved which could not be resolved without hearing the parties, there was no great urgency such as would justify the haste, and a considerable sum of money was involved.

The notice given must be reasonable not only in the sense that enough time must be provided in which to prepare a case, but also in the sense that every possible step must be taken to ensure that the party affected is in fact aware that a decision is to be made on the particular issue and that he may make representations. In BEAVERBROOK LTD. v. HIGHWAY TRAFFIC AND MOTOR TRANSPORT BOARD(27) the Manitoba Court emphasized that there are circumstances in which notice must be specifically given to individuals affected even though a statute may contain no such provision. Acting under THE HIGHWAYS PROTECTION ACT, 1966 (Man.)(28) the Motor Transport Board issued a control order affecting certain land owned by the plaintiffs. The order was made only after holding the public hearing required by statute, and after publishing notice of the hearing as required by s.15(3) of the Act:

> The subsection goes on to provide for specific notice to the Minister of Urban Development and Municipal Affairs, the traffic authority for the highway, the municipality in which the highway is situated, and notice in a newspaper of general circulation and in the Manitoba Gazette. Nowhere is it specifically stated that notice should be given to "all persons who own, or have an interest in, land situated".(29)

Nevertheless, Mr. Justice Hunt was of the view that there had been a breach of natural justice and that there had therefore been no legal hearing at all:

> Under all the circumstances of this case, I must find that the Traffic Board, not having given effective notice, therefore failed to hold a public hearing at which "all persons who own, or have an interest in, land" were permitted to appear and make submissions. How can one do so unless one has effective notice of such a hearing?(30)

In coming to his conclusion that the Board had not complied with the common law requirements of notice his Lordship laid considerable emphasis on three matters:

(1) it would have been "a simple administrative task to obtain the names of those persons or corporations with a registered interest in lands.... and given them particular notice".(31)

(2) the effect on the individual was drastic: "such an order amounts substantially to expropriation of the effective use of the land concerned. It destroys its usefulness to the owner while leaving the owner in possession of the legal title and still liable for payment of taxes...."(32)

(3) "To expect people who are owners of such lands to obtain, read, consult and act on the sort of notice given in the Manitoba Gazette and in the newspaper advertising which we have here is unrealistic."(33)

MOSHOS v. THE MINISTER OF MANPOWER AND IMMIGRATION(34) is another case illustrating that notice must be adequate. It is not enough that some action which may by some technical argument amount to notice has been taken. In that case a Deportation Order was made against a non-immigrant who had taken employment without permission and against his wife and children. The relevant provisions were section 37(1) of the IMMIGRATION ACT(35) and section 11 of the IMMIGRATION INQUIRIES REGULATION. At an inquiry into the status of Mr. Moshos his wife appeared as a witness. The Special Inquiry Officer read section 37(1) to her: "Where a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it". He also advised her that it might be desirable to retain counsel. The question arose as to whether this satisfied the requirement of section 11 of the IMMIGRATION INQUIRIES REGULATIONS:

> 11. No person shall, pursuant to subsection (1) of section 37 of the Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an immigration officer that he should not be so included.

Martland, J., for the Supreme Court felt that this provision had not been complied with:

> It is true that the Special Inquiry Officer read the provisions of s.37(1) to her and told her that "in view of this section of the Regulations (sic), in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and your children in such deportation order". He also asked her if she wished to secure counsel "before giving evidence". He then proceeded to question her.
>
> However, at no point was she told she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s.37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity.(36)

The notice given must be adequate not only in the sense that it must seek to actually draw the attention of persons to their opportunities to be heard and in the sense that it must be given in a reasonable time before the scheduled time of the hearing, but also in the sense that it must be sufficiently precise as to the case to be met. So far as is possible nothing is to be left to quess-work. This was emphasised in FOREST v. LA CAISSE POPULAIRE DU SAINT - BONIFACE CREDIT UNION SOCIETY LIMITED(37) where Freedman, J.A., for the Manitoba Court of Appeal said that:

> Notice here means adequate notice. It should be clear and definite, so that its recipient will know precisely what he has to meet. Certainly, where expulsion is contemplated the notice should so state, and leave nothing to guess - work.(38)

Moreover, his Lordship did not feel that it was at all relevant that the plaintiff in fact knew what he had done. He quoted with approval Professor Dennis Lloyd's observation that "it seems hardly adequate that the accused member should be left to guess what is to be alleged against him even though his guess may well turn out to be correct".(39)

The decision-making body need not make known every detail of the case to be met. The question - as always - is of what is reasonable in all the circumstances. In SELVARAJAN v. RACE RELATIONS BOARD Lord Denning M.R. had this to say:

> that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure.... It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.(40)

This passage has been expressly approved in Alberta in McCARTHY v. BOARD OF TRUSTEES(41) and in the Supreme Court of Canada in RE NICHOLSON.(42) The question of how much detail must be revealed will be discussed further in section three and four of this Chapter.

It is sufficient at this stage to note that failure to notify a person of at least the substance of the case against him will normally constitute a breach of natural justice.

(2) EXAMINATION OF REPORTS AND SECRET EVIDENCE

It was said above that the requirement of notice involved informing the person of the case he has to meet in as much detail as is necessary to permit the adequate preparation of argument. With regard to internal reports and secret evidence considered by the decision-maker this will impose duties that are variable according to the circumstances. Four main principles guide the approach of the courts to such questions:

(1) The normal rule is that persons whose interests will be affected by administrative decisions have a right to see all evidence that is available to the decision-maker. Thus, in HOFER v. COMMUNAL PROPERTY CONTROL BOARD(43) it was held that there had been a breach of natural justice where a property control board refused to reveal to the applicants copies of submissions and representations made by opponents. Similarly, in RE FAIRFIELD MODERN DAIRY LTD. and THE MILK CONTROL BOARD OF ONTARIO(44) it was said that no hearing had been conducted in accordance with the governing statute where a dairy license was suspended without disclosing the evidence upon which the charge was based.

A corollary of this is that a tribunal cannot rely on information obtained after the hearing has been held unless the new evidence is disclosed and an opportunity to meet it is given.(45) There may, however, be an exception in some cases if the additional material considered is obtained from publicly known governmental sources. In R. v. SCHIFF et al., ex p. TRUSTEES OF OTTAWA CIVIC HOSPITAL(46) the board complained to the parties of the fragmentary nature of the material they had supplied. Following the hearing, and of their own initiative, they resorted to information provided by public governmental sources to complete the picture. This information was "entirely supplemental in its nature and kind to the very material the parties themselves supplied to the board".(47) In holding that this did not constitute a breach of natural justice Aylesworth, J.A., emphasized the unique set of circumstances which influenced his decision:

> The board complained of the fragmentary nature of the material supplied by the parties which was in the nature of statistics, collective bargaining agreements with other hospitals and the like, and it was natural that the board should be expected to look to it in view of that expressed dissatisfaction made known to the parties and in view of the board's intention expressed to them that it was going to seek further data of its own volition. Having regard to the highly informal method of procedure adopted by the parties in the hearing before the board of arbitration and, as I have said, to the nature of the material and the kind of presentation made with respect to that material as well as to the nature of the public material resorted to by the board, we fail to perceive any failure to afford natural justice to the trustees in what the board did in that respect....
>
> ....what the board did with respect to getting the kind of material it did get after the hearing, and with respect to the use to which the board put it, really was very much akin to what frequently is resorted to in the regular Courts of law wherein those Courts take judicial notice of well-known public

> facts, knowledge and information. We think what has already been said illustrates that similarity and demonstrates that in fact there was no denial of natural justice.(48)

It is submitted that what the board did in this case was in substance not very different from what occurs when an expert tribunal weighs the evidence and arguments presented to them against their own expertise accumulated through a thorough familiarity with previous cases of similar nature.

(2) If the decision-maker's standard procedure involves reliance upon reports prepared for it by inspectors the plaintiff will normally have no right to see such reports. It is permissible for a tribunal to "hear" through its inspectors. This is the result of the House of Lords decision in LOCAL GOVERNMENT BOARD v. ARLIDGE, where the appellant asked both to see the report which was made following a full public hearing and thereafter to be heard again on the whole case. Viscount Haldane L.C. was of the view that there is no such right "[p]rovided that the work is done judicially and fairly".(49) To hold otherwise would be to force the wheels of state to grind to a halt:

> The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible, not only for what he himself does, but for all that is done in his Department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency.

> Unlike a judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff.

In such cases it may be that the decision-maker is not obliged to hear as a matter of practicality.(50) Or, it may be that the courts tacitly recognize the fact that in many circumstances the formal decision is no more than a formality, the effective conclusion having been reached by the "inspector".

(3) If, however, the inspector conducts his inquiry in a manner that is in breach of natural justice there will normally be a right to know the substance of the report and to be heard by the ultimate decision-maker: "if the purported 'advice' is bad, then any decision which takes [illegible]dvice into account is tainted by the illegality".(51) [illegible] is one possible explanation of KNAPMAN v. BOARD OF HEALTH FOR SALTFLEET TOWNSHIP(52) where an inspector's adverse report resulted in an order being issued to vacate certain cottages owned by the plaintiff. Certiorari was granted to set aside the closing order because neither the inspector nor the Board of Health permitted Knapman to know the nature of the case against him or to make representations before the order was issued. Gale, J., approved the following dictum:

> It is not consistent with natural justice that the mind of the trinunal should be swayed by statements which are not communicated by the appellant, and with which he is given no opportunity to deal, and which are either (a) a summary of, or an expression of, the result of the evidence given before the inspector, or (b) statements of fact made by the inspector as the result of his inspection. An order cannot justly be made against a man upon evidence not disclosed to him so that he may rebut it if he can.(53)

In many such cases the "inspector" is in effect a prosecutor, gathering evidence and mustering arguments against an individual, rather than the impartial investigator of the ARLIDGE type. In any situation where the inspector's role is of this nature there is clearly a very strong case to be made that the person whose interests are to be affected should both know the content of the report and be given an opportunity to answer to it before the ultimate decision-maker. The right to know the contents of a prejudicial report in such circumstances has been upheld in cases involving (amongst others) a stewards report to the Ontario Racing Commission,(54) a police report to the Secretary of State on an application for citizenship,(55) a rent regulations officer's report to the Alberta Rent Regulation Appeal Board,(56) and the report of an investigating committee of a municipal council hearing a charge of damage to crops.(57)

(4) The normal rule that a person is entitled to know all of the evidence against him before being heard may, however, be modified for reasons of public policy.(58) This will occur, for example, where matters of national security are at issue(59) or where there is a real danger of strong-arm tactics being used against informants.(60) In an case involving the control of gambling in the United Kingdom, Lord Denning M.R., expressed the view that the Gaming Board

> can and should receive information from the police in this country or abroad who know something of them. They can, and should, receive information from any other reliable source. Much of it will be confidential. But that does not mean that the applicants are not to be given

> a chance of answering it. They must be given a chance of answering it. They must be given the chance, subject to this qualification: I do not think they need tell the appellant the source of their information, if that would put their informant in peril or otherwise be contrary to the public interest.... Likewise with the details of the information. If the board were bound to disclose every detail, that might itself give the informer away and put him in peril. But, without disclosing every detail, I should have thought that the board ought in every case to be able to give the applicant sufficient indication of the objections raised against him such as to enable him to answer them. That is only fair. And the board must at all costs be fair.(61)

As in other areas, the standard here would seem to be the maximum degree of fair play that is consistent with the effective functioning of the tribunal. Natural justice requires only what is reasonable after all relevant considerations have been weighed. Confidentiality, and the reasons for it, is one such consideration to be taken account of.

(3) PARTICULARS

It will be recalled that in FOREST v. LA CAISSE POPULAIRE Freedman, J.A., expressed the view that the requirement of adequate notice is only met where it is "clear and definite, so that its recipient will know precisely what he has to meet".(62) Although this statement is to be understood in a limited sense in cases involving state security or a confidentiality that must be protected for public policy reasons, it undoubtably holds true in all situations in which there are no compelling reasons why the precise case to be met should not be revealed.

In RE WILSON AND LAW SOCIETY OF BRITISH COLUMBIA(63) a barrister and solicitor was served with a citation informing her that the Disciplinary Committee would be holding a hearing to determine if she had committed any of the offences set out in s.48 of British Columbia's LEGAL PROFESSIONS ACT.(64) Mr. Justice Toy took the view that this did not constitute adequate notice, having regard to all the circumstances:

> [T]o notify the member of that the disciplinary committee will determine if she has been guilty of any of the offences set out in s.48, is a much too all-encompassing expression to conceivably be construed as adequate notice of the accusation or accusations made against the member....
>
> ....Such a description encompasses every conceivable dereliction that a member could be reprimanded, fined, penalized for costs, suspended or disbarred for. In all conscience how could a member be asked whether or not she is prepared to admit or deny such a complaint?
>
> Notice and appropriate notice, in my respectufl view, are principles of natural justice that persons subject to proceedings of this nature are entitled to as a fundamental rights.(65)

At the very least, a person should know the issues raised before the tribunal. In any case, whether the legal duty of disclosure has been fulfilled will depend on all the circumstances of the case and on the particulars which were in fact revealed to him.(66)

Again, it should be noted that there may be situations in which it will be said that natural justice has been complied with even though the particulars provided were not in fact sufficient to permit the person concerned to adequately prepare his arguments The issues here are essentially the same as are involved where secret evidence is obtained by the tribunal, and similar principles govern.(67)

(4) ORAL HEARING

The right to be heard does not necessarily involve a right to an oral hearing. It means only that an adequate opportunity must be given to present a case. What is adequate will depend on all the circumstances surrounding the exercise of the particular power in issue. Thus, at one extreme, simple written submissions will suffice, while at the other (for example, where voracity is a key issue), a full oral hearing may be required. Moreover, in a number of circumstances, the right may involve less than would be required to allow for an adequate presentation: for example, if there is a need for a quick decision, or if the range is so great as to make the granting of an oral hearing to everyone whose interests might be affected manifestly impossible.

The governing principle in this area is the freedom of administrative tribunals to determine their own procedure, provided only that they do not select a course which is unfar: "They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".(68) The necessity of an oral hearing was specifically considered in the recent Privy Council decision in JEFFS v. NEW ZEALAND DAIRY PRODUCTION & MARKETING BOARD,(69) where Viscount Dilhorne (for the board) said:

> In the discharge of its duty to act judicially, it was the board's duty to "hear" interested parties. In R. v. LOCAL GOVERNMENT BOARD, ex. p. ARLIDGE Hamilton L.J. said:
>
> > In my opinion, the question whether the deciding officer "hears" the appellant audibly addressing him

> or "hears" him only through the medium of his written statement is, in a matter of this kind one of pure procedure.(70)

Viscount Dilhorne emphasized that the procedure used was within the discretion of the decision-maker and that an oral hearing could have been dispensed with on the facts. It may, however, be a necessary component of fairness if the credibility of witnesses is involved.(71)

These decisions have been approved by the Canadian Supreme Court on at least two occassions(72) and, the position is the same here as in the United Kingdom or New Zealand:

> It has been stated that "an admistrative tribunal is not bound to hold oral hearings if they give the parties the chance to state their case in writing".(73) This is a fair generalization of the general view: such tribunals as are required by statute, or by the common law, to allow interested persons to present or dispute a case, may choose either oral or written submissions so long as the means chosen afford such persons an adequate opportunity to do either.(74)

(5) ADJOURNMENT

In some situations it may be necessary to delay proceedings in order to provide a person with a reasonable opportunity of meeting the case against him.(75) A tribunal does not, however, have to grant every adjournment that is requested by the parties. The test is one of reasonableness and the party making the request must not seek adjournment merely to compensate for his own haphazard approach to preparation of his case.(76) Reid and David have suggested that two main elements are relevant in determing whether a refusal of adjournment will amount to breach of natural justice in any given case: "Failure to grant an adjournment, or a sufficient adjournment, may amount to a denial of natural justice, provided it deprived a person of a reasonable opportunity to answer the case against him, and provided further that he showed a good reason for his request".(77)

The decision whether to adjourn or to proceed immediately is a matter for the tribunal's discretion. In R. v. BOTTING Laskin, J.A. (as he then was), said that where a magistrate is hearing a preliminary inquiry "[a] discretion is vested in him to grant or refuse an adjournment; and in my opinion, even if he is unwise to refuse an adjournment, he does not either lose or exceed his jurisdiction". Nevertheless, this discretion is not unlimited. It must be correctly exercised. According to Culliton C.J.S.,

> "When there has been a wrongful refusal to grant an adjournment, resulting in the denial of natural justice, certiorari may lie to quash the order and directions of the Board.... Whether or not there has been a wrongful refusal to grant an adjournment must be determined in light of the facts in each case."(79)

In each case the tribunal must balance the complexity and seriousness of the issue against the desirability of reaching a conclusion as soon as possible. Previous cases have recognized the legitimate concern of a party to seek adjournment in order to retain counsel (where that is otherwise necessary),(80) where the notice has been inadequate,(81) where it has been impossible to secure the attendance of essential witnesses,(82) and so on.

An adjournment need not be granted, however, if the applicant does not attempt to show why it is needed or if the sole reason is his own fault: "it is in general always for an applicant to show good reason not attributable to his own fault for obtaining an adjournment".(83) Thus, in RE PIGGOTT CONSTRUCTION LTD.(84) the complainant was unable to establish a right to adjournment because it "did not act reasonably". It knew of the unsuitability of the date proposed one month in advance, but didn't notify the Board until the actual time of the hearing. The result was that the Board and the opposing parties were greatly inconvenienced for no other reason than the company's lack of courtesy in not objecting to the date at an earlier time. The company

> never at any time, although there was ample opportunity to do so, advised the Board that the date of April 4th was not a satisfactory one for a hearing. Had it done so, the Board might have arranged for a date mutually agreeable to both parties. The Board was not given an opportunity to do so.(85)

Where, however, the complainant has acted with all reasonable haste, seeking delay only where it is truly necessary for him to present his case, and requesting an extension as soon as he became aware of the need for it, adjournment should normally be granted.(86)

(6) CROSS - EXAMINATION

The importance of cross-examination in the ordinary courts of the common-law nations can scarcely be over-emphasized:

> It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the Civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the ascertainment of truth....

> If we omit political considerations of broader range, then cross-examination, not trial by jury is the great and permanent contribution of the Anglo-American system of law to improve methods of trial procedure.(87)

It has often been asserted that the right to cross-examination is as essential to ensure justice before administrative tribunals as it is in the ordinary courts. In a case involving an investigation by the Superintendent of Insurance of a complaint that a company had discriminated in its automobile insurance rates, the Ontario Court of Appeal expressed its view that the opportunity to cross-examine was an essential part of natural justice. By refusing to allow such cross-examination, the Superintendent

> violated every principle of fair-play, of natural justice. No doubt he thought he was obtaining the actual facts from the witnesses: but every Judge and most lawyers know that it constantly happens that witnesses telling a plausible story with apparent candour are shown by cross-examination to be utterly unreliable - that a perfectly honest and competent witness may give a wrong impression which may be corrected by a question or two - that a perfectly honest and competent witness may be mistaken....(88)

The right of cross-examination has been characterized as "a fundamental and important part of the privilege of self-defence"(89) and a crucial component of natural justice.

Nevertheless, there have been a number of cases in which it was said that the requirements of natural justice had been met even though cross-examination had not been permitted. In ST. JOHN v. FRASER(90) the appellant argued that natural justice had been denied because he had not been allowed to cross-examine every witness who was heard by the investigator. In the Supreme Court of Canada Davis J., said:

> The right was asserted as a right to which every witness against whom a finding might possibly be made was entitled. I do not think any such right exists at common law.... It is natural, as Lord Shaw said in the ARLIDGE case, at p. 138, that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers.(91)

A fundamental principle of administrative law is that administrative bodies are masters of their own procedure, provided only that they are fair: "They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".(92)

Whether or not a right to cross-examine exists will depend on the particular circumstances of each case.(93) Generally, the question is whether it would serve any useful purpose. Even if it would, however, the tribunal is entitled to consider the convenience to all parties in deciding whether the general utility is better served by permitting or by denying cross-examination. In BUSHELL v. SECRETARY OF STATE FOR THE ENVIRONMENT Lord Diplock emphasized that there are other ways of obtaining accurate information and pointed out that an inquisitorial system works to general satisfaction in European Court of Justice. No argument can be heard that such a system is per se unfair:

> Whether fairness required an inspector to permit a person who had made statements on matters of fact or opinion, expert or otherwise, to be cross-examined by a party who wished to dispute a particular statement must depend on all the circumstances. In the instant case the question arose in connexion with expert opinion on a technical matter. The most important consideration was the inspector's own view whether the cross-examination would be likely to enable him to make a more useful report to the minister in reaching his decision, and was sufficient to justify any expense and inconvenience to other parties to the inquiry by prolonging it.(94)

A person has no "right" to cross-examination as such. What he does have is a right to rebut opposing evidence and to correct or contradict prejudicial statements,(95) and in some circumstances this may only be possible by means of cross-examination. Thus, in TORONTO NEWSPAPER GUILD v. GLOBE PRINTING CO. the Ontario Labour Relations Board's decision not to allow cross-examination as to facts relevant to certification of a bargaining agent was held to be a jurisdictional error. The ratio of the decision was expressed by Kellock, J.:

> the board here in question, having refused to permit the respondent to examine the documentary evidence filed by the applicant and having by its regulations and the interpretation which it had given them, prohibited the employer from himself inquiring among his employees with respect to union membership, effectively removed from the respondent by its ruling with respect to the proposed cross-examination its only remaining means of knowing what the case of the appellant was.(96)

This passage was considered by McRuer, C.J.H.C., in the Ontario case RE JACKSON AND ONTARIO LABOUR RELATIONS BOARD where his

Lordship emphasized that the GLOBE case did not establish any general right to cross-examination, but turned rather narrowly on its peculiar facts:

> I do not think it was the procedure the Board followed that was the vital part of the case, but it was the fact that it did not attempt to investigate the reliability of the information that was before it. True, cross-examination would have been a very obvious way to test it but it was not necessarily the only way....(97)

Although it has been said that cross-examination is a particularly useful means of resolving disputes as to fact,(98) the line between fact and opinion may be extremely difficult to draw in certain cases,(99) and such a distinction cannot serve as a valid basis for deciding whether cross-examination should be permitted or not. On the whole, the Courts will be reluctant to over-judicialize the administrative process and "[i]f there are other ways in which a party's case might have been adequately presented then there is no right to cross-examine. On the other hand, if cross-examination was the only effective means of presenting a material point it may well be a reversible error to preclude it".(100) Even if it is the only possible means of making a material point, however, the courts may hold that cross-examination is not necessary if it would impose an inconvenience greater than the seriousness of the issue to be determined by the tribunal would warrant.(101)

(7) COUNSEL

It has on occasion been asserted that natural justice can never impose a requirement that legal counsel be permitted to appear before an administrative tribunal. In BYRNE v. KINEMATOGRAPH RENTERS SOCIETY LTD.(102) Harman, J., expressed the view that natural justice required nothing beyond knowing the nature of the accusation made, having an opportunity to state the answering case, and that the tribinal act in good faith. This lead Lyell, J., in PETT v. GREYHOUND RACING ASSOCIATION LTD. (no. 2) to conclude that a "right" to legal representation formed no part of natural justice:

> I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs.(103)

Such a view cannot, however, be sustained. If the dicta of Harman J., is read as meaning that a person must have an adequate opportunity to present his case, it is clear that there may be occasions when legal counsel will be required.

The PETT case is somewhat unusual in the Lyell's statement was issued in trial of a matter which had already gone to Appeal on interlocutory proceedings. His Lordship's view on a right to legal representation was directly contradictory of the view which had been expressed by the Court of Appeal in PETT (No. 1). The issue in the case was whether the Greyhound Racing Association could exclude counsel from a hearing investigating the alleged drugging of a racing dog. The Association defended their course of action in an affidavit which said that

> [I]f legal representation were allowed as of right, the delay and complications that this would cause would largely frustrate the steward's intention to conduct their meetings expeditiously and with complete fairness."(104)

Lord Denning, M.R., disagreed however. In a judgment the result of which was concurred in by Davies and Russell, L.JJ., his Lordship emphasised the seriousness of the charge and the effect that it would have on a man's reputation and livelihood. While the general right to appear by agent might be excluded in inquiries dealing with minor matters this could not be permitted where a tribunal's decision was "of serious import":

> Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.(105)

In RE BACHINSKY and CANTELON v. SAWYER the Alberta Supreme Court accepted the arguments of Lord Denning. Shannon, J., was of the view that the right to counsel was an issue that could be resolved in each case by reference to one question: "Can it be said that the applicants are being deprived of the opportunity to make full answer and defence and that there is therefore a denial of natural justice?"(106) His Lordship considered four matters to be of crucial importance in concluding that natural justice required representation by counsel on the facts of the case before him:

(1) the charge was very serious (unlawful or unnecessary use of police authority);

(2) the effect of an adverse finding on a man's reputation and livelihood would be drastic, the maximum penalty being dismissal from the force;

(3) the proceedings were of a formal and technical nature, similar to the proceedings of a Criminal Court;

(4) the provisions for representation by an other member of the force were inadequate to ensure that fairness was done; and

(5) an internal appeal, at which counsel would be allowed, could not be curative in light of the fact that the appellate body would be limited to considering the record of the proceedings before the lower tribunal.(107)

The approach taken by Mr. Justice Shannon demonstrates that in each case the right to counsel will turn on the court's view of the particular circumstances. This desire to mould the requirements of natural justice to meet the needs of the particular applicant and the particular tribunal has also been emphasized in the British Columbia Supreme Court. In RE CHISHOLM v. JAMIESON,(108) Mr. Justice Andrews reviewed a number of authorities dealing with legal representation before administrative tribunals and concluded:

> I find only one consistency in all of these references, namely, that "the requirements of the principles of natural justice must depend on the circumstances at hand(109)

His Lordship approved Shannon, J.'s view that

> the trend in our law is towards enlargement and entrenchment of the right to counsel. However that right is not yet absolute with respect to proceedings before quasi-judicial tribunals. The common law position is that it must be considered in the larger context of natural justice. Therefore, I must consider the facts and circumstances of the individual case and decide whether or not there will be a denial of natural justice if the applicants are not permitted to have their counsel represent them at the hearing....(110)

As was the case in PETT and in RE BACHINSKY, the Court was much influenced by the fact that a man's livelihood and reputation were at stake.(111)

It would, however, be going too far to say that there is a right to be legally represented whenever a serious matter is to be determined by an administrative tribunal. The courts are jealous to protect their own authority and will not impose lawyers upon a tribunal when the only purpose they would serve would be to aid the tribunal in deciding matters that would be better left to the ordinary courts. This is the result of ENDERBY TOWN FOOTBALL CLUB LTD. v. THE FOOTBALL ASSOCIATION, where Lord Denning, M.R., said:

> I am of opinion that the court should not insist on legal representation before the tribunal of the F.A. The points which the club wishes to raise are points of law which should be decided by the courts and not by that tribunal. The club is at liberty to bring these points before the courts at once and

> have them decided with the aid of skilled advocates. If it chooses not to bring them before the courts, but prefers to put them before a lay tribunal, it must put up with the imperfections of that tribunal and must abide by its ruling that there be no legal representation.(112)

Moreover, the courts will not allow a man to ignore a set of rules to which he has subscribed unless a very strong case is made out. Although a club must not fetter its discretion by saying that it will never permit counsel to be present(113) it will be permissible to exclude legal representation in a great variety of circumstances. Thus, on the facts of the ENDERBY TOWN FOOTBALL CLUB case, Fenton Atkinson, L.J. was of the view that the rule promoted speed and saved heavy legal fees, while doing nothing to exclude "the rights of either party to challenge a decision in the courts if the lay tribunal goes wrong in law".(114) Cairns L.J. simply pointed out that neither adimistrative convenience nor justice was furthered by having lawyers present!(115)

It has, further, been suggested that there will be no right to legal representation where disciplinary powers are being exercised.(116) The judgments of the English Court of Appeal in FRASER v. MUDGE(117) reveal, however, that the so-called discipline exception applies only in circumstances where delay would be prejudicial to the general good; where "[i]t is of the first importance that the cases should be decided quickly".(118) In any event, it is submitted that the notion that discipline cases are a category apart cannot survive the Supreme Court of Canada's decision in MARTINEAU (No. 2).(119)

As is the case regarding the other "rights" which form part of natural justice, the inclusion or exclusion of a right to legal representation will vary with the circumstances. While the cases discussed here give some indication of the factors which are considered by the courts and the arguments that will weigh heavily with them, the conclusion must in the end be subjective. Little objection can be raised to de Smith's conclusion

> that, in general, legal representation of the right quality before statutory tribunals is desirable; and that a person threatened with social or financial ruin by disciplinary proceedings in a purely domestic forum may be gravely prejudiced if he is denied legal representation.... Development of the case-law on implied rights to legal representation in non-statutory environments should be guided by a realistic appraisal of the interests of the person claiming it, as well as of the interests of the organization to which he belongs.(120)

It may indeed be that there is a trend in our law "towards enlargement and entrenchment of the right to counsel".(121) Nevertheless, potential litigants would do well to take heed of the warning implied in Jackson's observation that, in England, the courts

> have emphasised the importance of a right to legal representation in hearings before tribunals, although in every case the applicant concerned failed to establish his right.(122)

(8) OPEN COURT

The "right" to open court is one which, uniquely amongst the procedural rights associated with natural justice, is more frequently imposed by administrative tribunals than desired by the parties appearing before them. The "right" is one which is enforced by the courts as a matter of political principle, and is founded on the belief that procedures observed and decisions made in the open are more likely to be just and impartial than those made in secret meetings behind closed doors.

In the ordinary Courts of law there are very few exceptions to the rule that judicial proceedings must be open to the public. The requirement of open court is seen as part and parcel of the common-law's preference of freedom under the law over the arbitrary exercise of power: "In Courts of law and justice, that is the Courts of the land in the true sense, the rule is open Court. Open Court is the palladium of liberty."(123) A judge has no individual discretion to opt for proceedings in camera [except in a limited number of fields established by precedent and statute(124)], and the parties cannot by consent confer such power upon him.

Administrative tribunals are not however bound by the same rules. In the absence of statutory prescriptions, they are masters of their own procedure, and have a discretion to opt for either open or private proceedings, as they see fit. In RE MILLWARD and PUBLIC SERVICE COMMISSION, Cattanach, J., said:

> While it behoves a non-judicial body exercising judicial functions to conform to the practice prevaling in Courts of law, in so far as the purpose for which those bodies were set up permits, there is no requirement, nor have I found any case and none was cited to me, that a body of this nature need sit in public in the absence of statutory direction to the contrary.... where a statute directs that an inquiry shall be held but is silent as to the manner

> in which it shall be conducted, then, in such a case, it follows that the matter is left to the discretion of the particular tribunal.(125)

Normally, where a matter of procedure is left to the discretion of a tribunal, the only legal requirement is that the procedure actually adopted must be as fair as is possible in all the circumstances. This not quite the case with regard to the requirement of open court, for the judges have clearly expressed their preference that administrative tribunals make their proceedings open to the public. This is implicit in the opening part of Cattanach's statement quoted above. In R. v. TARNOPOLSKY, ex. p. BELL, Laskin, J.A., for the Ontario Court of Appeal went so far as to say that, "[i]f there is any general rule applicable where the statute is silent, it is that the proceedings of a statutory tribunal should be conducted in public hearings unless there be good reason to hold them in camera'.(126) If a "good reason" is presented, however, the tribunal must consider it seriously. They must consider the arguments on both sides in coming to their conclusion. While it would seem proper for the tribunal to approach the question with a predisposition to holding an open inquiry, to have a firm and inflexible policy would seem to infringe the rule against the fettering of discretion. Moreover, if the case for a private inquiry is strong enough, the courts will take whatever steps may be necessary to prevent the proceedings from continuing in public.

Under s.17 of the INDUSTRIAL ASSURANCE ACT, 1923,(127) in effect in the United Kingdom in 1930, the Industrial Assurance Commissioner was entitled to hold an inspection of the affairs of a company if, in his opinion, "any collecting society or industrial assurance company" had committed or was likely to commit an offence against any of three enumerated statutes. In HEART OF OAK ASSURANCE COMPANY LTD. and ATTORNEY-GENERAL (128) the plaintiff objected to an enquiry ordered under the act being held in public and with reporters present. Upholding his arguments Lords Thankerton and MacMillan stressed that the inquiry was held purely in order to inform the Commissioner of the relevant facts so that he could decide whether to carry the matter further. Thus, Lord MacMillan laid considerable emphasis on the fact that

> the inspection is intended to be a proceeding of a purely preliminary character. It is obviously appropriate to conduct in private an investigation of such a character, designed as it is to inform the mind of the responsible official so that he may be able to decide whether he should or should not take any overt action, especially when the investigation may be initiated merely on reasonable suspicion of the probability of some irregularity having occurred. (129)

Their Lordships were alive also to the effect that unsubstantiated rumours sparked by the inquiry might have on a company's reputation. Lord MacMillan thought that administrative efficiency should be balanced against fair treatment, and that both, on occasion, may work together to demand that the hearing be held in camera:

> ....there are two main considerations to be kept in mind. On the one hand it is important to secure that the efficiency of the procedure for the purpose in view is not impaired. On the other hand it is not less important to ensure that fair treatment is accorded to all concerned. I am satisfied that both these ends can best be attained by the holding of such inspections in private. I can well imagine that irreparable harm might unjustly be done to the

> reputation of a company and much anxiety unnecessarily occassioned to its policy-holders by giving publicity to such preliminary investigations.(130)

It would seem reasonably clear, therefore, that where preliminary inquiries are being made into a matter which, if proved, would have a serious adverse effect upon the legal person appearing before a tribunal, private proceedings are appropriate. However, it is for the person seeking an in camera inquiry to protest,(131) and if he cannot obtain the consent of the opposing party(132) he must show good reason for not proceeding in open court.(133) Even then, if the tribunal decides to proceed in public, the complainant will have to comply with the tribunal's ruling, and participate fully in the hearing.(134)

(9) HEARING BY THE DECISION-MAKER

It has been observed that the word "hearing" receives a very special interpretation with regard to natural justice. In some circumstances a decision-maker will be said to have fairly "heard" both sides when he sees or hears only an inspectors report.(135) "The collecting of evidence may be delegated, subject of course to the rules, statutory or contractual, governing a particular tribunal".(136) The basic rule is that the decision-maker must inform himself of the relevant evidence, but that the way in which he does this is largely a matter for his own discretion.

Cases turning on the issue of who has heard have come to the Courts in two main types of fact-situation. In the first, there is a committee of persons who are charged with the duty of hearing and deciding on a particular matter and the membership of (or attendance at) that committee varies during the course of the proceedings. In the second, a decision-maker delegates the task of gathering evidence to another party.(137)

In R. v. HUNTINGDON CONFIRMING AUTHORITY, ex. p. GEORGE & STAMFORD HOTELS LTD. the English Court of Appeal considered the first fact-situation. Quashing an order at the Confirming Authority Lord Hanworth, M.R., said:

> We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case might not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.(138)

The courts are concerned that in such situations a persuasive or eloquent person may be able to affect the outcome of the vote even in situations where his own ballot was not a tie-breaker,(139) and his very presence will be considered as potentially influential even in the absence of any evidence that he in fact took part in the deliberations.(140) The GEORGE AND STAMFORD HOTELS decision has been cited and approved in a number of Canadian cases dealing with powers as diverse as trade union certification,(141) disbarrment of a lawyer,(142) suspension of an accountant's licence,(143) and expulsion from a trade-union,(144) to name only a few. It is a well-established component of natural justice.

The second category of fact situation was considered by the House of Lords in OSGOOD v. NELSON (1872)(145) who agreed with the Court of Exchequer Chamber that no delegation was involved where a decision-maker simply ordered an inquiry to be made by a lower tribunal. Lord Colonsay expressed the view that:

> there was no violation of the rule against delegation in this case. The mode adopted was the mode in which such inquiries are ordinarily conducted by such a tribunal. What was the course which Mr. Anderson stated to have been requisite? It was that after this committee had made their report, if they did make such a report, there should have been an assembling of the Common Council, there should have been a prosecutor appointed, and there should have been a new trial with all the formalities of a criminal trial, before they could have arrived at a conclusion. But the committee appointed to inquire into this matter having made the inquiry in the ordinary way, having collected the evidence in the ordinary way, and allowed the party, who had been present at the collecting of the evidence, to state his case by counsel, I cannot conceive a more fair mode of proceedings.....(146)

The decision-maker must, however, make himself genuinely familiar with the evidence presented, even if only in summary form. In JEFFS v. NEW ZEALAND DAIRY BOARD the Privy Council said that while, in some circumstances, "it may suffice for the board to have before it and to consider an accurate summary of the relevant evidence and submissions" this is only so "if the summary adequately discloses the evidence and submissions to the board".(147) It would seem, therefore, that a decision-maker cannot act solely on the basis of recommendations made by an inspector or investigating committee.(148) On the other hand, the mere fact that the investigating body has included recommendations in its report will not constitute a breach of natural justice provided the decision-maker "has enough information to enable it to make a fair assessment of the case".(149)

(10) THE RULE AGAINST BIAS

In order that a person may have a fair hearing it is essential that the decision-maker not approach the particular problem with a pre-disposition to decide one way or the other: "It is necessary that a tribunal should be impartial, fearless and free from bias so as to be able to do its work without fear or favour and with an objective view of things".(150) Canadian law thus enforces the "rule against bias". Although often referred to by the maxim nemo judex in re sua (which literally prohibits a person from being judge in his own case), the prohibition extends to prevent a person from assuming the role of a judge if there is any reason whatsoever to suspect him of partiality.

The rule is properly considered one of the most fundamental elements of natural justice, and it is the least flexible. Indeed, it is not uncommon to see statements to the effect that nemo judex is an absolute rule, not to be tampered with in any way. Unlike the other elements of natural justice this cannot be molded to suit administrative convenience. Thus, the McRUER COMMISSION reported that

> [t]he rule against interest or bias applies without qualification (other than necessity as in the case of the courts) to judicial tribunals other than the courts. If a member of a tribunal has an interest in the subject matter, or is biased, he is disqualified from making a decision,

> and if he purports to do so his decision will remain unauthorized.(151)

In DIMES v. GRAND JUNCTION CANAL the House of Lords emphasized that they would not consider the degree to which a person's interest might influence his judgment nor, indeed, whether actual bias has been shown. In that case Cottenham, the English Lord Chancellor, had affirmed a number of decrees made in favour of a canal company in which he was a share-holder. In reversing the decrees on account of pecuniary interest Lord Campbell said:

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man is to be a judge in his own cause, should be held sacred.... And it will have a most salutary influence on tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only in their decrees that they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.(152)

Despite its very great breadth, there are limits to the rule: "[a] line must.... be drawn between genuine and fanciful cases".(153) The test must be whether a reasonable person would believe there to be a real danger of bias.(154) "Obviously, the standard of a morbid person cannot be used. Nor, however, can one use that of an irrepressible optimist, never accepting that 'even when Man's passions are noble they are too often diverted from their true course'".(155) In GREYHOUND LINES OF CANADA LTD. v. MOTOR TRANSPORT BOARD the Alberta Court of Appeal applied the "reasonable apprehension of bias" test to deny an order of prohibition. The issue arose when two companies, Diversified Transportation Ltd., and Pacific Western Transportation Ltd., applied for certificates to operate public service passenger vehicles on some of the same routes then served by Greyhound Lines. Greyhound's affidavit stated:

> That the applicant, Diversified, is substantially indebted to the Provincial Treasury Branch, an arm of the Provincial Government, created pursuant to THE TREASURY BRANCHES ACT, R.D.A. 1970 Ch. 370 and under the jurisdiction of the Provincial Treasurer and that being so indebted, cannot apply to the Motor Transport Board (also referred to as the Highway Traffic Board), a Provincial Board, incorporated pursuant to THE PUBLIC SERVICE VEHICLES ACT, R.S.A. 1970, Ch. 300, and falling under the jurisdiction of the same Provincial Government and in particular, the Minister of Highways and Transport, without raising in the mind of the public and Greyhound Lines of Canada Ltd., a party whose rights may be affected by the said application, a reasonable apprehension of bias.(156)

Clement, J.A., after investigating the Board's relationship with the Provincial Government, concluded that there was no "reasonable apprehension of bias" on the facts before him:

> ....it goes much too far to say that a board functioning as a corporation, separate from ministerial or other governmental supervision or direction, is subject to apprehension of bias towards a departmental interest merely because its members are appointed by the Lieutenant-Governor in Council for,

> let us assume, a limited term of office. This proposition would stretch reasonable apprehension into sheer speculation, which is not acceptable as a concomitant of reasonableness.(157)

The "reasonable apprehension" test has been used in a number of other cases to the advantage of administrators accused of bias. Thus, there was no reasonable apprehension of bias where the Chairman of the Anti-Dumping Tribunal, having disqualified himself because of previously acting as a consultant to the protesting Canadian industries, checked the phraseology of the Tribunal's reasons and permitted his name to appear on the decision.(158) Nor is there a bias where a Doctor is a member of both a professional disciplinary committee hearing a case of misconduct and the executive committee which had previously suspended the complainant, provided he did not in fact participate in the meeting or proceedings of the latter committee in so far as they concerned the complainant.(159) Any theory of predetermination by association "must be restricted to very special circumstances...."(160) Moreover, "what is contemplated is not what would be regarded as a probability or a reasonable suspicion by a person who is completely ignorant of the particular decision-making process involved".(161) Thus, predetermination by association is not to be presumed merely because one member of a government department had made statements indicating a bias prior to an investigation being undertaken by another officer of that department.(162) The principle is further illustrated by reference to the ordinary courts of law where, according to Professor Wade,

> [a] line must be drawn between genuine and fanciful cases. A justice of the peace is not disqualified, merely because he subscribes to a society for preventing cruelty to animals, from hearing a prosecution instituted by the society.(163) Where a county council had prosecuted a trader under the FOOD AND DRUGS ACT, it was held no objection that the justices' clerk was a member of the council, upon proof that he was not a member of the council's Health Committee, which had in fact directed the prosecution.(164) The Court of Appeal protested against the tendancy to impeach judicial decisions "upon the flimsiest pretexts of bias", and against "the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".(165)

There will, however, be a "reasonable apprehension of bias" where a person sits on the appeal from his own decision,(166) and this will be so even though he in fact only answers questions put by other members of the appellate tribunal and does not attempt to influence the outcome.(167) Similarly, a person conducting a preliminary investigation which comes to a conclusion adverse to the complainant should not normally sit at formal hearings.(168) This may all be part of a larger principle that "where an adjudicator acquires special knowledge of a matter prior to adjudication, there is a reasonable possibility.... of the risk that he might prejudge the matter".(169)

In any given case the question of whether there is "reasonable apprehension of bias" is one for the subjective assessment of the judge. Thus, while close family relations will clearly raise the likelihood of bias, there comes a stage at which the relationship is distant enough to be of no effect. Similarly, Alexis points out that while an adjudicator may be a member of the same social or sports club or of the same (or opposed) political organization as a party to the proceedings without raising a reasonable suspicion of bias, these are not totally irrelevant considerations:

> ....although none of these circumstances can by itself produce a substantial possibility of bias, in combination with others they might well have this effect, especially if membership of the organization causes the adjudicator and a party to work closely together, as committee members, for example.(170)

Where a pecuniary interest is involved, however, a bias will be presumed regardless of how small that interest may be. An adjudicator is disqualified by "even the slightest pecuniary interest",(171) though it be "less than a farthing".(172) None the less, a reasonable test is involved to a certain degree, for the pecuniary interest must be direct and certain. If the alleged interest is merely remote, speculative, or contingent, it will not result in disqualification.(173)

It will be observed that in all cases the question of whether there is a "bias" such as will result in breach of natural justice is resolved by reference to a reasonableness test of one sort of another. This is so whether the bias is alleged to arise from pecuniary interest, an intermingling of functions, departmental bias or other prejudice. Reasonableness in this context is admittedly applied somewhat differently from reasonableness in respect of the other components of natural justice. In dealing with bias the courts do not overly balance administrative efficiency against absolute fairness. It is the area in which the common law rules of fair play are least flexible, and properly so, as there can be no degrees of bias. Even where the reasonable apprehension test is satisfied however there is no legal ground for complaint where the procedure was prescribed by statute(174) nor where there is no alternative to an interested party making the decision.(175)

Finally, it should be noted that ministerial or departmental policy cannot be regarded as a disqualifying bias:

> One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to government policy.(176)

(11) RIGHT TO REASONS

At common law there is no general rule that tribunals must state reasons for their decisions.(177) This is a situation which has been severely criticized by civil libertarians. Their source of concern has been ably summarized by the English Frank's committee:

> We are convinced that if tribunal proceedings are to be fair to the citizen reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have been properly thought out. Further, a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal.(178)

Legislatures have proved sensitive to such criticism and it is not unusual for statutes to provide that reasons for decisions should be given. In particular, s.8 of Alberta's ADMINISTRATIVE PROCEDURES ACT(179) provides:

> 8. Where an authority exercises a statutory power so as to adversely effect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
> (a) the findings of fact upon which it based its decision, and
> (b) the reasons for the decision.

Dealing with a similar provision in the United Kingdom's TRIBUNALS AND INQUIRIES ACT,(180) Megaw, J., (as he then was) expressed the view that the reasons given must be "proper, adequate reasons". They must be intelligible, and must "deal with the substantial points that have been raised".(181) His Lordship would not, however, permit the requirement that reasons be given to give rise to merely vexatious litigation:

> I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing would be sufficient ground for involving the jurisdiction of this court.(182)

These statements were expressly approved by D.C. McDonald, J., of the Alberta Supreme Court, in RE MORIN and PROVINCIAL PLANNING BOARD(183) where he expressed the view that failure to comply with section 8 of the Alberta Act will render any order made a nullity.(184) Moreover, if the reasons given reveal that an erroneous legal approach has been followed the decision can be quashed.(185)

It should be noted, however, that the Alberta legislation applies only to such authorities as are designated by the Lieutenant Governor in Council (s.3) and that it can only apply to Provincially authorized exercises of "a statutory power" (s.2(a)). The Act can have no application to Federal Boards, and does not attempt to impose any requirements upon domestic tribunals. It can be confidently predicted that the latter will continue to be reluctant to give reasons, which might provide ammunition for litigation.

(12) OVERVIEW

Having considered the various components of natural justice, it is apparent that each of them is subject to a reasonableness test, both as to applicability and as to precise composition. Thus, for example, on a hearing to determine a complex issue it may be necessary to give a relatively long period of advance warning of the time and place of the hearing, and the matter that will be determined at it. None the less, specific notice to each individual who may be affected will not be required if an indeterminate or very large number of persons might be affected. The one exception is the rule against bias, in which "reasonableness" is relevant only to the question of whether the interest alleged in the decision-maker is sufficient to result in disqualification. A hearing by a decision-maker who is in any degree biased cannot possibly be fair, and there can be no "trade-offs" between the rule against bias and other procedural rights.

It is apparent from the cases which have been discussed in this Chapter that the courts have in fact given considerable guidance as to the elements they will consider important in determing whether any particular course of action was reasonable. When the issue of the requirements of natural justice arises, the appropriate content is determined by weighing the demands of administrative efficiency against the requirements of fair play in the particular circumstances. Although the courts usually refer to this as a one stage process, the test in fact involves two balancing operations.

The first step is to determine what fairness will require to ensure that the individual concerned truly has an opportunity to meet the case against him. While it is neither possible nor desirable to provide an exhaustive list of the factors the courts will consider at this stage of their enquiry, the following have been emphasized in the cases: whether the power in question relates to application, expectation, or forfeiture; the extent of the financial interest involved; whether the total setting in which the power is exercised provides for overall fairness even though one or more of the components of natural justice is lacking; whether voracity is in issue; the complexity of the matter to be determined; the convenience of the parties; the decision-maker's own honest view of the helpfulness of following a particular procedure; the effect of the ultimate decision on reputation or career; the degree of formality and technicality of the proceedings; the benefits of speed and economy; and any terms to which the individual has agreed. Moreover, an administrator's action may not be considered reasonable if he fails to take into account the degree of sophistication of the individual concerned.

Having established the procedure which would be appropriate if an absolutely fair procedure were to be followed, the court will then consider whether the standard should be modified in any way. There will be no breach of natural justice in any case in which the administrator was as fair as possible, even though this may not measure up to the standards of absolute fairness. The limits of possibility are circumscribed by factors such as the need to protect informants and to safeguard state secrets; the urgency of the matter; the numbers of people affected; the adminstrator's volume of work; and the burden which would be placed upon him if he were to comply fully with the procedure which would seem requisite having regard only to the elements considered in step one.

All of the above is, of course, subject to the qualification that many powers are governed by express statutory provisions which may be as varied as the moods of legislators themselves. In Alberta the ADMINISTRATIVE PROCEDURES ACT(186) contains a number of provisions which apply to all authorities designated by the Lieutenant Governor in Council. However, the Act makes heavy use of words such as "adequate", "reasonable", and "fair", and it is submitted that with the excpetion of the addition of a requirement that there be written reasons for decisions, the Act adds nothing to the common law.

Where no procedure is prescribed by statute, the courts will consider the factors outlined above (and any others that may be relevant in the particular case) to determine what fairness is required. What is needed to satisfy the requirements of natural justice varies over a broad spectrum, from the most attenuated form of hearing to proceedings approximating to court-room procedure. In no case, however, will the judiciary impose a burden which is greater than the administration is capable of bearing.

CHAPTER IV - FOOTNOTES

(1) in POSLUNS v. T.S.E. [1965] 46 D.L.R. (2d) 210 at 319.

(2) Chapter 1(4).

(3) Chapter 2(3).

(4) see Chapter 3(2).

(5) [1964] A.C. 40 at 64.

(6) [1960] 1 A.E.R. 631.

(7) [1978] 12 A.R. 505 at 524, para. 20, per Clement J.A.

(8) (unreported) At p. 27 of the S.C.C. transcript.

(9) R. v. SECRETARY OF STATE, ex. p. HOSENBALL [1977] per Geoffrey Lane L.J.

(10) WISEMAN v. BORNEMAN [1971] 297 at 308F per Lord Reid.

(11) e.g. the urgency of the matter.

(12) e.g. is it a question of wrong-doing, a policy assessment, a question of suitability for a new position, privilege etc.

(13) e.g. does the issue involve suspension from a club, expropriation, expulsion from a trade union or university, etc.

(14) [1949] 1 A.E.R. 109 at 118E.

(15) (unreported) 3/3/80 per Dickson J. at p. 7 of S.C.C. transcript.

(16) [1967] 2 A.C. 337 (P.C.) Discussed above in Chapter 3(1)(iv).

(17) (1979] 1 S.C.R. 495 at 504 per Dickson J. cf. the formulation of Laskin C.J.C. in MITCHELL v. R. [1975] 61 D.L.R. (3d) 77 at 83-84.

(18) [1978] 3 A.E.R. (Ch.D.) 211.

(19) ibid. at 218 B-C.

(20) [1978] 12 A.R. 505 at 524, para. 20, per Clement J.A. (Alta. C.A.).

(21) [1964] A.C. 40 at 64, per Lord Reid.

(22) (4th ed., 1978) The University of Alberta.

(23) [1955] 15 W.W.R. 104, 63 Man. R. 6 at 109, approved in Alberta by Kirby J. in Chambers in CAMAC EXPLORATION LTD. v. OIL AND GAS CONSERVATION BOARD OF ALBERTA [1964] 47 W.W.R. 81 at 85.

(24) YOUNGBERG v. DISCIPLINE COMMITTEE OF THE ALBERTA TEACHER'S ASSOCIATION, 8 A.R. 36.

(25) KLYMCHUK v. COWAN [1964] 47 W.W.R. 467 at 480 per Smith J.

(26) [1894] Q.R. 410 at 413. The headnote offers a translation of this passage: "where it appears to the court that one of the parties to the arbiration was taken by surprise and had no opportunity of supporting his pretentions, more especially in a case where the arbitrators were not in a position to arrive at a correct estimate of the amount which should be awarded without hearing the parties and their proofs, the award will be annulled."

(27) [1973] 4 W.W.R. 473.

(28) R.S.M. 1970 c. H50.

(29) [1973] 4 W.W.R. 473 at 477 per Hunt J.

(30) ibid. at 480.

(31) ibid. at 480.

(32) ibid. at 476.

(33) ibid. at 480.

(34) [1969] S.C.R. 886.

(35) R.S.C. 1952, c.325.

(36) supra. at 891-892.

(37) [1963] 41 W.W.R. 48.

(38) ibid. at 54.

(39) quoted ibid. at 55: Professor Dennis Lloyd, "Judicial Review of Expulsion by a Domestic Tribunal" (1952) 15 M.L.R. p. 413 at 418.

(40) (1976] 1 A.E.R. 13 at 19.

(41) [1979] 4 W.W.R. 725 at 738.

(42) [1978] 88 D.L.R. (3d) 671 at 682.

(43) [1967] 60 W.W.R. 559 (Alta.).

(44) [1942] O.W.N. 579.

(45) PFIZER CO. LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE, [1975], 68 D.L.R. (3d) 9, 6 N.R. (S.C.C.).

(46) [1970] 3 O.R. 476 (Ont. C.A.).

(47) ibid. at 479 per Aylesworth J.A.

(48) ibid. at 479-480 per Aylesworth J.A.

(49) [1915] A.C. 120 at 133-134.

(50) see discussion below.

(51) A. Beavan, note on R. v. SECRETARY OF STATE, ex. p. HOSENBALL [1977] P.L. 201 at 204.

(52) [1954] 3 D.L.R. 760 (Ont. H.C.); approved on appeal [1956] 6 D.L.R. (2d) 81 (S.C.C.).

(53) in LOCAL GOVERNMENT BOARD v. ARLIDGE [1914] 1 K.B. 160 at 188, per Buckley L.J., approved by Gale J. in [1954] 3 D.L.R. 760 at 772. The House of Lords decision in ARLIDGE can however be supported because the facts of KNAPMAN and ARLIDGE are distinguishable. In the latter case a full public hearing at which all side were heard was conducted by the inspector before submitting his report, whereas no equivalent attempt to hear was made in KNAPMAN'S case.

(54) R. v. ONTARIO RACING COMMISSION, ex. p. TAYLOR [1971] 1 O.R. 400 (Ont. C.A.).

(55) LAZAROV v. SECRETARY OF STATE OF CANADA [1973] F.C. 927.

(56) MADISON DEVELOPMENT CORPORATION LTD. v. RENT REGULATION APPEAL BOARD [1977] 7 A.R. 360 (Alta. S.C.).

(57) RE POFFENROTH APPLICATION [1954] 13 W.W.R. (N.S.) 617 (Alta.).

(58) or simply because secrecy is expressly permitted by the terms of the governing statute. This was the case in R. v. MANITOBA LABOUR BOARD; ex. p. BAKERY AND CONFECTIONARY WORKERS [1967], 62 D.L.R. (2d) 219 at 225.

(59) R. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, ex. p. HOSENBALL [1977] 1 W.L.R. 766.

(60) R. v. GAMING BOARD OF GREAT BRITAIN, ex. p. BANAIM and KHAIDA [1970] 2 Q.B. 417.

(61) ibid. at 630, approved in Canada by Thurlow, J., of the Federal Court in LAZAROV's case, supra.

(62) [1963] 41 W.W.R. 48 at 54. see also YOUNGBERG v. DISCIPLINE COMMITTEE OF THE ABLERTA TEACHER'S ASSOCIATION, 8 A.R. 36 (Alta. C.A.); POLLOCK v. ALBERTA UNION [1978] 12 A.R. 398 at 408.

(63) [1974] 47 D.L.R. (3d) 760 (B.C.S.C.).

(64) R.S.B.C. 1960, c.214, rep. & sub. 1971, c.31, s.21.

(65) [1974] 47 D.L.R. (3d) 760 at 761-762.

(66) see Cartwright J., (dissenting) in LABOUR RELATIONS BOARD v. TRADERS SERVICE LTD. [1958] S.C.R. 672 at 691.

(67) see, for example, ex p HOSENBALL [1977] 1 W.L.R.766. It is submitted that similar considerations were in the minds of the majority of the Canadian Supreme Court in deciding MITCHELL v. R. [1975] 61 D.L.R. (3d) 77. If this is not the case, the views of the minority in that case and of Toy J., in WILSON's case are clearly preferrable to the nonsense reasons given by the majority (quoting the head-note at p. 78): "the requirements of s.2(c)(i) (of the CANADIAN BILL OF RIGHTS) guaranteeing the right to be informed promptly of the reason for one's arrest or detention were met. The reason was the suspension of the accused's parole, of which fact the accused was aware. His real complaint was merely that he had not been informed of the reasons why parole was suspended and later revoked, but the CANADIAN BILL OR RIGHTS does not require the Board to disclose its reasons for its decisions".

(68) BOARD OF EDUCATION v. RICE [1911] A.C. 179 at 182, per Lord Loreburn. Subsequently approved by Viscount Haldane L.C. in LOCAL GOVERNMENT BOARD v. ARLIDGE (1914) A.C. 120 at 133.

(69) [1967] 1 A.C. 551 at 566G.

(70) [1914] 1 K.B. 106.

(71) [1967] 1 A.C. 551 at 568G.

(72) R. QUE. LABOUR RELATIONS BOARD, Ex. p. KOMO CONSTRUCTION INC. [1969] 1 D.L.R. (3d) 125; QU. LABOUR RELATIONS BOARD v. CANADIAN INGERSOLL RAND CO. LTD. [1968] 1 D.L.R. (3d) 417.

(73) VERNON v. PUBLIC UTILITIES COMMN. [1953] 9 W.W.R. (N.S.) 63 at 65 (B.C.C.A.).

(74) Robert F. Reid and Hillel David, "Administrative Law and Practice" (2nd ed., 1978) Butterworth & Co. (Canada) Ltd., p. 95.

(75) e.g. BURNBRAE FARMS LTD. v. CANADIAN EGG MARKETING AGENCY [1976] 65 D.L.R. (3d) 705 (F.C.A.); RE SREEDHAR & OUTLOOK UNION HOSPITAL BOARD [1972] 32 D.L.R. (3d) 491 (Sask. C.A.).

(76) R. v. ONTARIO LABOUR RELATIONS BOARD; ex p. NICK MASNEY HOTELS [1969] 2 O.R. 797; 13 D.L.R. (3d) 289 at 293-294 (C.A.); RE CRUX & LEOVILLE UNION HOSPITAL BOARD (no. 2) [1972] 32 D.L.R. (3d) 373; 35 D.L.R. (3d) 619 (Sask. C.A.).

(77) Robert F. Reid and Hillel David, Administrative Law and Practice (2nd ed., 1978) Butterworth & Co. (Canada) Ltd. p. 220.

(78) [1966] 56 D.L.R. (2d) 25 at 42.

(79) RE PIGGOTT CONSTRUCTION LTD. and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA [1974] 39 D.L.R. (3d) 311 (Sask. C.A.) at 312.

(80) R. v. HALLCHUK [1928] 1 D.L.R. 731.

(81) RE SREEDHAR & OUTLOOK UNION HOSPITAL BOARD [1973] 32 D.L.R. (3d) 491.

(82) RE BASS [1959] 19 D.L.R. (2d) 485.

(83) R. v. MEDICAL APPEAL TRIBUNAL (MIDLAND REGION), ex p. CARRARINI [1966] 1 W.L.R. 883 at 888.

(84) p. 317, op. cit.

(85) ibid., cf. RE CAMAC and OIL & GAS CONSERVATION BOARD [1964] 43 D.L.R. (2d) 755, discussed in Chapter 3(3) (ii)(c) above.

(86) RE SREEDHAR and OUTLOOK UNION HOSPITAL BOARD [1973] 32 D.L.R. (3d) 491.

(87) Wigmore, Evidence (Chadbourn rev.), Little Brown and Co., Toronto (1974) 1367.

(88) IN RE GENERAL ACCIDENT INSURANCE [1926] 58 O.L.R. 470 at 479, per Riddell J.A.

(89) R. v. CITY OF CALGARY, ex p. SANDERSON [1965] 53 W.W.R. 638 at 640, per Milrain, J. (Alta. S.C.); see also YOUNGBERG v. DISCIPLINE COMMITTEE OF THE ALBERTA TEACHERS' ASSOCIATION, 8 A.R. 36; POLLOCK v. ALBERTA UNION [1978] 12 A.R. 398.

(90) [1935] S.C.R. 441.

(91) ibid. at 453-454.

(92) BOARD OF EDUCATION v. RICE [1911] A.C. 179 at 182, per Lord Loreburn.

(93) see RE COUNTY OF STRATHCONA & MACLAB ENTERPRISES LTD. [1971], 20 D.L.R. (3d) 200 at pp. 203-204 (Alta. C.A.); RE ELLIOTT & GOVERNORS OF THE UNIVERSITY OF ALBERTA [1973] 37 D.L.R. (3d) 197; RE HEPPLEWHITE & CRIMINAL INJURIES COMPENSATION BAORD, unreported, Ont. Dv. Ct., Nov. 22, 1972.

(94) The Times, 12/2/80.

(95) see KORYTKO v. CITY OF CALGARY [1963] 46 W.W.R. 273 (Alta. S.C.) at 285 per Kirby J.

(96) [1953] 2 S.C.R. 18 at 36.

(97) [1955] O.R. 83 at 99; approved in the Supreme Court of Canada in RE CANADIAN LABOUR RELATIONS BOARD & TRANSAIR LTD. [1977] 1 S.C.R. 722.

(98) see Robert F. Reid and Hellel David, Administrative Law and Practice (2 ed. 1978) Butterworth & Co. (Canada) Ltd. pp. 81-82.

(99) see Lord Edmund-Davies' dissent in BUSHELL v. SECRETARY OF STATE FOR THE ENVIRONMENT, The Times 12/2/80.

(100) F.A. Laux, The Administrative Process (4th ed., 1978) University of Alberta.

(101) see Lord Diplock's judgment in BUSHELL's case, supra. Note, however, that the ratio common to the majority would appear to be that "cross-examination would not have served any useful purpose" (per Viscount Dilhorne).

(102) [1958] 1 W.L.R. 762, approved by the Privy Council in UNIVERSITY OF CEYLON v. FERNANDO [1960] 1 W.L.R. 223.

(103) [1969] 2 A.E.R. 221 at 231 G (Q.B.D.).

(104) ibid. at 549I.

(105) ibid. at 549F. It should bot noted, however, that legal aid will not generally provide for counsel before administrative tribunals. Against Denning's approach it may be said that permitting representation by counsel or solicitor replaces one inequity with another. The proceeding's "in-built bias" shifts from favouring the educated, intelligent and articulate to favouring those who by labour, luck or legacy can afford the better lawyers.

(106) [1974] 1 W.W.R. 295 at 300 (Alta. S.C.), noted by D.P. Jones, Vol. 2], No. 1, McGill L.J. (1975) p. 156.

(107) ibid. at p. 304.

(108) [1974] 47 D.L.R. (3d) 754 (B.C?S?C?).

(109) ibid. at p. 759. The emphasis is Andrew J.'s.

(110) ibid. at 759.

(111) ibid. at 759.

(112) [1971] 1 Ch. 601 at 607. See also Cairns L.J. at 609 G.

(113) [1971] 1 Ch. 601 at 605 F, 607 D, per Lord Denning, M.R. ch. however 609 D, per Cairns, L.J.

(114) ibid. at 608 H.

(115) ibid. at 609 E-F.

(116) e.g. RE McLEOD & MAKSYMOWICH [1973] 12 C.C.C. (2d) 353 at 364, per Morrow J.; cf. MAYNARD v. OSMOND [1977] Q.B. 240, which, however, turned on the particular statutory regime involved: noted [1977] C.L.J. 205 by W.A. McKean.

(117) [1975] 3 A.E.R. 77.

(118) ibid. at 79 G, per Lord Denning, M.R.

(119) See also discussion above, Chapter 3(5).

(120) S.A. de Smith, Judicial Review of Administrative Action, (3d ed., 1973), Stevens & Sons Ltd. (London) p. 188.

(121) supra., note 110.

(122) Paul Jackson, Natural Justice (2d ed., 1979), Sweet & Maxwell Ltd. (London) p. 74. Applicants have, of course, done somewhat better in Canada: BACHINSKY v. SAWYER, supra.; RE CHISHOLM, supra. It should be noted too that under the CANADIAN BILL OF RIGHTS the right to counsel is protected in some circumstances: s.2(c), (d).

(123) RE MILLWARD and PUBLIC SERVICE COMMISSION [1975] 49 D.L.R. (3d) 295 at 303 (Fed. Ct.).

(124) per Cattanach, J., ibid. at 303-304.

(125) ibid. at 304.

(126) [1970] 2 O.R. 672 at 680.

(127) 13 & 14 Geo. 5, c.8.

(128) [1932] A.C. 392 (H.L.).

(129) ibid. at 401-402. Lord Thankerton, at p. 396-397 speaks to similar effect.

(130) ibid. at 403.

(131) RE MILLWARD and PUBLIC SERVICE COMMISSION, supra.

(132) see Lord Hanworth, M.R., in HEART OF OAKS ASSURANCE CO. LTD. v. ATTORNEY-GENERAL [1931] 2 Ch. 370 at 393.

(133) RE MILLWARD and PUBLIC SERVICE COMMISSION, supra.

(134) ibid.

(135) See above, Chapter 4(2).

(136) Paul Jackson, Natural Justice (2nd ed., 1979), Sweet & Maxwell (London), p. 79.

(137) It is clear, however, that he must not attempt to delegate his power to decide (see J. Willis, Delegatus Non Potest Delegar (1943) 21 C.B.R. 257), unless this is permitted by the statute. In MINISTER OF NATIONAL REVENUE v. WRIGHT'S CANADIAN ROPES LTD. [1947] A.C. 109 the Court demonstrated a willingness to read statutes so as to permit a power of delegation where that was necessary for the efficient functioning of the statutory scheme.

(138) [1929] 1 K.B. 698 at 714.

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(139) ibid. at 717, per Romer, J.: "The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown."

(140) See HUGHES v. SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, CANADIAN DISTRICT & HEINEKEY, [1962] 31 D.L.R. (2d) 441 at 446, per Verchere, J.

(141) R. v. LABOUR RELATIONS BOARD, ex. p. GORTON-PEW (N.B.) LTD. RE CANADIAN FISH HANDLERS' UNION LOCAL No. 4 [1952] 2 D.L.R. 621 (N.B.C.A.).

(142) MEHR v. LAW SOCIETY OF UPPER CANADA [1955] S.C.R. 344.

(143) RE RAMM [1957] 7 D.L.R. (2d) 378 (Ont. C.A.).

(144) HUGHES v. SEAFARERS' INTERNATIONAL UNION, supra.

(145) [1872] L.R. 5 H.L. 636.

(146) ibid. at 653. See also Chapter 4(2) above.

(147) [1967] 1 .A.C. 551 at 569 A.

(148) To do so would be either an unlawful delegation or a fettering of discretion. This is, however, little consolation to the complainant, who will generally have no right to see the reports: see Chapter 4(2) above.

(149) R. v. RACE RELATIONS BOARD, ex p. SELVARAJAN [1975] 1 W.L.R. 1686 at 1698, per Lawton, L.J.

(150) M.C.J. KAGZI, Indian Administrative Law, Metropolitan Book Co. (Private) Ltd., Delhi (1962), p. 105.

(151) ROYAL COMMISSION OF INQUIRY INTO CIVIL RIGHTS, Queens Printer, Ontario, 1968.

(152) [1853] 3 H.L.C. 759 at 793.

(153) H.W.R. Wade, Administrative Law, Clarendon Press, Oxford (eth ed., 1977) p. 401.

(154) There has been a rather sterile debate as to whether the test should be "real likelihoon" of bias or "reasonable apprehension". There is no need to enter into this debate for "it now seems clear that the Canadian courts have established the proper test as being whether a 'reasonable apprehension of bias' exists...."

(F.A. Laux, The Administrative Process (4th ed., 1978) p. 597. In England the position is probably the same: see Alexis, op. cit. infra.

(155) F. Alexis, Reasonableness in the Establishing of Bias (1979) P.L. 143 at 148. The phrase in double quotation marks is Sir Hugh Wooding's. Law Reform Necessary in Trinidad and Tobago (1966) 9 Can. B.J. 292 at 298.

(156) quoted in the judgment of Clement, J.A. [1978] 4 Alta. L.R. 280 at 281.

(157) ibid. at 284.

(158) P.P.G. INDUSTRIES CANADA LTD. v. THE ATTORNEY GENERAL OF CANADA [1976] 2 S.C.R. 739; noted by D.P. Jones, (1975) 55 C.B.R. 718.

(159) RINGROSE v. COLLEGE OF PHYSICIANS & SURGEONS OF THE PROVINCE OF ALBERTA [1977] 1 S.C.R. 814.

(160) ibid. at 824, per de Grandpre, J.

(161) RE CACCAMO and MINISTER OF MANPOWER & IMMIGRATION (1977) 75 D.L.R. (3d) 720 (F.C.A.), per Jackett, C.J.

(162) ibid.

(163) R. v. DEAL JUSTICES [1881] 45 L.T. 439.

(164) R. v. CAMBORNE JUSTICES, ex. p. PEARCE [1955] 1 Q.B. 41.

(165) H.W.R. Wade, Administrative Law, (4th ed. 1977), Clarendon Press, Oxford, pp. 401-402.

(166) R. v. ALBERTA SECURITIES COMMISSION, ex. p. ALBRECHT [1962] 38 W.W.R. 430, 36 D.L.R. (2d) 199 (Alta. S.C.).

(167) KANE v. UNIVERSITY OF BRITISH COLUMBIA (unreported decision of the Supreme Court of Canada, 3/3/80); cf. RE ELLIOT and GOVERNORS OF THE UNIVERSITY OF ALBERTA, [1973] 37 D.L.R. (3d) 197, the result of which is surely thrown in doubt by the KANE decision.

(168) RE McGAVIN TOASTMASTER LTD. [1973] 37 D.L.R. (3d) 100 (Man. C.A.).

(169) Francis Alexis, op. cit., at 155. See COMMITTEE FOR JUSTICE v. THE NATIONAL ENERGY BOARD [1978] 1 S.C.R. 370; On the question of institutional bias generally see D.P. Jones, Institutional Bias: The Applicability of the Nemo Judex Rule to Two-Tier Decisions, (1977) 23 McGill, L.J. 605.

(170) Alexis, op. cit., at 115.

(171) R. v. GAISFORD [1892] 1 Q.B., 381 at 384, per Mathew, J.

(172) R. v. RAND [1866] L.R. 1 Q.B., 230 at 232, per Blackburn, J.

(173) R. v. RAND, supra.; R. v. DEAL JUSTICES [1881] 45 L.T. 439. The pecuniary interest was sufficiently direct to satisfy the test in RE MOSKALYK - WALKER and ONTARIO COLLEGE OF PHARMACY, [1976] 58 D.L.R. (3d) 665 (Ont. Div. Ct.) where the decision to discipline the complainant would adversely affect the sale price of his business, which one of the members of the tribunal was attempting to purchase.

(174) McARTHUR v. COUNCIL OF THE MUNICIPAL DISTRICT OF FOOTHILLS No. 31, [1977] 4 Alta. L.R. 222.

(175) See COMMITTEE FOR JUSTICE v. NATIONAL ENERGY BOARD [1978] 1 S.C.R. 370; RE CACCAMO and MINISTER OF MANPOWER & IMMIGRATION [1977] 75 D.L.R. (3d) 720 (F.C.A.).

(176) H.W.R. Wade, *Administrative Law*, Clarendon Press, Oxford (4th ed., 1977) p. 415.

(177) See, e.g. R. v. GAMING BOARD FOR GREAT BRITAIN, ex. p. BENAIM and KHAIDA [1970] 2 Q.B. 417; McINNES v. ONSLOW FANE [1978] 3 A.E.R., 211.

(178) FRANKS COMMITTEE on Administrative Tribunals and Enquiries, Cmnd. 218 (1957), para. 98. See also the Alberta SPECIAL COMMITTEE ON BOARDS AND TRIBUNALS (Clement Committee), 1965 at pp. 34-36.

(179) R.S.A. 1970 Ch. 2.

(180) 1958 (U.K.) c. 66.

(181) RE POYSER and MILL's ARBITRATION [1964] 2 Q.B. 467 at 477.

(182) ibid. at 478.

(183) [1974] 6 W.W.R. 291.

(184) The position is not so clear in the United Kingdom. See de Smith, *Judicial Review of Administrative Action*, Stevens & Sons Ltd., (3d ed., 1973) p. 130.

(185) See de Smith, op. cit., p. 128.

(186) R.S.A. (1970) c. 2; see Appendix I.

CHAPTER V - REMEDIES FOR BREACH OF NATURAL JUSTICE

While an exhaustive discussion of the remedies available in administrative law would be beyond the scope of this thesis some consideration of the options open to a person who has suffered unfair procedure is necessary. Much of the preceding Chapters has been concerned with "rights": the "right" to notice; the "right" to an oral hearing; the "right" to know the case to be met; the "right" to particulars; and so on. Yet, it is sterile to talk of a "right" where there is no legal remedy avaialble to enforce it. In the legal sense there can be no "right" at all without a remedy. Others have given very full and adequate consideration to the remedies of administrative law,(1) and little purpose would be served by going over the same ground yet again. There are however three topics which have caused some considerable confusion in academic circles and regarding which the direction given by the judiciary has in the past been either inconsistent or muddle-headed or both. These concerns the correct interpretation of the Atkin dictum in R. v. ELECTRICITY COMMISSIONS, the meaning of section 28 of the FEDERAL COURT ACT, and the necessity of exhausting all available appeals before coming to the courts to seek judicial review for breach of natural justice.

(1) R. v. ELECTRICITY COMMISSIONERS

It will be recalled that in R. v. ELECTRICITY COMMISSIONERS Atkin, L.J. had this to say about the writs of prohibition and certiorari:

> the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.(2)

In Chapter 2 above it was observed that while this statement has at times been taken as imposing severe limitations on the jurisdiction of the courts, it is now given a liberal interpretation. The better view is that a duty to act judicially is to be inferred whenever a power is exercised which may affect the rights, interests, powers, priviliges, or legitimate expectations of others. The question remains, however, as to whether the elusive "super-added" quality of judicialness must be found before the remedies of certiorari or prohibition will issue. In an early article on the English "fairness" cases Martin Matthews posed the question in these terms: "If the aggrieved party seeks an order of certiorari or prohibition, will the requirement that the body concerned be under a duty to act judicially re-arise, or will the test be dispensed with at that stage as well?"(3)

It is not proposed to make heavy going of this problem, which is rather simply overcome. Professor Wade has provided a very adequate historical analysis of the word "judicial" in the most recent edition of his "Administrative Law". The problem in the area of remedies is closely connected with the problem regarding the supervisory jurisdiction of the courts. In the latter context the courts originally justified their interventions by means of a circumlocution:

> They held that every judicial act is subject to the procedure required by natural justice; and they then denominated the great majority of administrative acts as "judicial" for this purpose. Instead of saying, as was in fact the truth, that natural justice must be observed in both judicial and administrative acts, the courts stretched the meaning of "judicial" in an unnatural way.(4)

In the former, the language used is the same and it has been interpreted in the same way. In RIDGE v. BALDWIN(5) the courts were asked to remedy breach of natural justice by means of a declaratory judgment.

> But Lord Reid perceived the close parallel between the part played by the term "judicial" in cases of natural justice and in cases where certiorari and prohibition are applied for. He explained how this term had been made a stumbling-block in earlier cases which had treated it as a superadded condition. In the correct analysis it was simply a corollary, the automatic consequence of the power to "determine questions affecting the rights of subjects". Where there is any such power, there must be the duty to act judicially.... Atkin L.J. might therefore have said
> ....and accordingly having the duty to act judicially...."(6)

The result of RIDGE is that the law has been set back on its correct course and that "[c]ertiorari and prohibition are once again recognised as general remedies for the control of administrative decisions affecting rights".(7)

The breadth of the prerogative remedies was recently recognized in the Supreme Court of Canada when Dickson, J., said that

> [c]ertiorari is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.(8)

The fundamental principle is that all powers of decision must be exercised lawfully. The remedies are again potent to give effect to this principle.(9)

(2) REVIEW UNDER S.28 OF THE FEDERAL COURT ACT

Under section 28(1) of THE FEDERAL COURT ACT(10) the Federal Court of Appeal is given extensive powers to "review and set aside a decision or order.... made by or in the course of proceedings before a federal board, commission or other tribunal". The factors which the Court can consider in its review under this section are so wide that the new remedy provided has been described as a "kind of appeal".(10) The section operates "[n]otwithstanding section 18", which transfers jurisdiction to grant the common law remedies from the superior Courts of the Provinces to the Trial Division of the Federal Court in all proceedings concerning federal bodies, commissions, or other tribunals. The Court of Appeal's jurisdiction does not however extend to bodies whose decisions are "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". On the other hand, the Trial Division has no jurisdiction to entertain any proceeding in respect of any decision or order that is before the Court of Appeal under s.28 application for review.(12)

The interplay of sections 18 and 28 of the Act has presented serious problems to the courts. The "quasi-judicial" character required by section 28 has traditionally been considered pre-requisite to the issuance of prohibition or certiorari. Both of these remedies however are allocated to the exclusive original jurisdiction of the Trial Division. The same - or a very similar - requirement would thus appear to be necessary under both sections. The Act is, however, quite express in its desire to keep proceedings under the two sections distinct.

In HOWARTH v. THE NATIONAL PAROLE BOARD the majority of the Supreme Court of Canada rejected the view that a duty to act judicially such as would satisfy section 28 would arise whenever private rights were affected.(13) Mr. Justice Pigeon expressed the view that

> the clear effect of the combination of ss.18 and 28 is that a distinction is made btween two classes of orders of federal boards. Those that, for brevity, I will call judicial or quasi-judicial decisions are subject to s.28 and the Federal Court of Appeal has wide powers of review over them. The other class of decisions comprises those of an administrative nature not required by law to be made on a judicial or quasi-judicial basis. With respect to that second class, the new remedy of s.28, the kind of appeal

> to the Appeal Division, is not available, but all the other remedies, all the common law remedies, remain unchanged by the FEDERAL COURT ACT.(14)

The problem, of course, is to determine what is left to the jurisdiction of the Trial Division. There has been some suggestion that the sections function so as to render unreviewable the decisions of federal tribunals which do not meet the "super-added" test of judicialness as endorsed in HOWARTH. Thus, in MINISTER OF NATIONAL REVENUE v. COOPERS AND LYBRAND, Dickson, J., for the Court, said that

> administrative decisions must be divided between those which are reviewable, by certiorari or by s.28 application or otherwise, and those which are non-reviewable. The former are conveniently labelled "decisions or orders of an administrative nature required by law to be made on a judicial or quasi-judicial basis", the latter "decisions or orders not required by law to be made on a judicial or quasi-judicial basis".(15)

This passage was relied on by the respondent in MARTINEAU (#2), who argued that "non-reviewability under s.28 forecloses review by writ of certiorari under s.18".(16) Mr. Justice Dickson himself however rejected this line of argument, insisting that the passage is to be very strictly read as applying only to the issue of the scope of section 28. The COOPERS AND LYBRAND judgment "has no direct application to the new and broader territory, unhindered by exigencies of classification, that is now opened by evolution of the common law doctrine of fairness enforced by common law remedies, including certiorari".(17)

In the result therefore, purely administrative bodies which breach the common law standard of fairness in making an "administrative" decision are subject to review by the Trial Division, while tribunals making decisions or orders "required by law to be made on a judicial or quasi-judicial basis" are reviewable by the Court of Appeal under s.28 proceedings. The elusiveness of the "super-added" test of judicialness has been commented on at length in previous Chapters, and it is apparent that the interpretation given to the FEDERAL COURT ACT presents potential complainants with a difficult decision as to the appropriate court in which to seek review. However, "the quandry of two possible forums is not less regrettable than complete lack of access to the Federal Court".(18)

Nevertheless, the difficulty which the choice presents to complainants should not be underestimated. To commence proceedings under the wrong section is to incur delay and increase costs. In some circumstances the extra time taken may render the remedy less than totally effective when it is obtained: all too often justice delayed amounts to justice denied. One wonders too how often ordinary persons of limited means have abandoned altogether their efforts to obtain justice after losing their first court battle against a fully staffed and well-financed government tribunal. In light of these considerations it is submitted that the better approach would be to interpret the word "quasi-judicial" in section 28 in the same way as in the context of natural justice, i.e., that a duty to act judicially arises whenever a power is being exercised which affects the rights of others. This was the view of the minority in the HOWARTH case:

> The grounds upon which the "review and set aside" remedy of s.28 is made available are essentially the same as, though broader than, those on which certiorari traditionally is issued to quash administrative decision. The combined effect of s.28(1) and (3) would seem to narrow the jurisdiction of the Trial Division in respect of certiorari to the point of disappearance but to make available in the Court of Appeal the new enlarged "review and set aside" remedy in respect of decisions or orders of federal boards, commissions or tribunals.... If the jurisdiction conferred on the Federal Court of Appeal by s.28(1) is to be rendered unavailable, the impugned decision or order must meet two criteria: (1) it must be of an administrative nature, (2) the board or tribunal must be free of any duty to decide on a judicial or quasi-judicial basis, i.e., free of any obligation to give effect to the principles of natural justice.(19)

Such an approach would have the double advantage of easing the problem of choice at the start of proceedings and of bringing the interpretation of section 28 more into line with the case law as it has developed in other areas. It would relieve Canadian judges of the unbecoming task of having to state emphatically that "fairness" is but a different name for natural justice while, in the same judgment, upholding an individual's right of access to the courts on the basis that fairness is not the same as natural justice.(20)

However, no such approach can be permitted if it would fly in the face of legislative intention. It is a well-known principle of statutory interpretation that "[w]hen an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense"(21) Thus,"quasi-judicial" must be interpreted in a manner that is consistent with the case law as it stood in 1970 when the FEDERAL COURT ACT was passed: the Act "tended to crystallize the law of judical review at a time when significant changes were occurring in other countries with respect to the scope and grounds for review".(22)

The germane question of course is as to which of the competing judicial constructions of the phrase was intended by the legislature. In HOWARTH's case the majority was of the opinion that the construction placed upon it by Mr. Justice Martland in his COPITHORNE(23) judgment was intended. Against this, however, it should be noted that L'ALLIANCE v. LABOUR RELATIONS BOARD(24) was never expressly over-ruled by the Canadian Supreme Court. There were thus conflicting judgments of that court in 1970, each equally authoritative. Moreover, the legisalture should not be presumed to have been ignorant of the English House of Lords decision in RIDGE v. BALDWIN(25) and in particular those passages which cast doubt upon the authority of NAKKUDA ALI.(26) This was the very case upon which Martland, J., relied in COPITHORNE. In light of Lord Reid's exhaustive analysis of the authorities - many of which had been adopted by the Canadian judiciary - it would not have been unreasonable to infer that Parliament intended a L'ALLIANCE/RIDGE interpretation of "quasi-judicial" when it enacted the FEDERAL COURT ACT.(27)

It should be noted too that there has been a certain inconsistency in the Supreme Court's application of the principles of statutory interpretation as regards ss.18 and 28. If it is assumed that the COPITHORNE approach was the only legitimate one under Canadian law in 1970, and that the courts are bound by that approach, then there is no room to permit certiorari to issue under s.18 where a body is not acting in a "quasi-judicial" capacity such as would bring it within the ambit of s.28. If RIDGE v. BALDWIN and the earlier cases cited therein are to be ignored in interpreting the FEDERAL COURT ACT then certiorari can only issue to control the actions of bodies having a superadded duty to act judicially.(28) "Certiorari" is after all, like "quasi-judicial", a word which has received a judicial construction. If COPITHORNE and NAKKUDA ALI are the leading cases, then certiorari most certainly cannot be taken as a remedy which avails "whenever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person".(29) While no objection is made concerning the court's approach to the requirements of the prerogative remedies, it is difficult to see why flexibility of interpretation is permitted as regards certiorari (s.18), but not in the context of s.28.

It is submitted that HOWARTH was decided at a time when neither RE H.K.'s "fairness" doctine(30) nor RIDGE v. BALDWIN were fully understood by the Canadian courts. There is considerable evidence that they are now coming fully to grips with the implications of these decisions, and the time is now ripe for a judicial re-assessment of the meaning of "judicial or quasi-judicial" in the context of section 28 of the FEDERAL

COURT ACT. In any event the close kinship of certiorari with "judicial" powers, however interpreted, is sufficient to ensure that the interplay of sections 18 and 28 will continue to present difficulty. The federal Parliament could do worse than to give some consideration to clarifying the Act establishing the Federal Court system.

(3) EXHAUSTION OF INTERNAL APPEALS AS A PRE-REQUISITE TO JUDICIAL REVIEW

There are times in law when the direct route to the resolution of a problem is to be preferred to a longer path leading to the same destination. Such indeed is the primary merit of the fairness cases. The direct route leads to the correct solution in clear-cut cases while lessening the likelihood of judges mistaking foxes-trails for the main trail when faced with a more difficult problem. At other times however the direct and apparently most desirable path will not lead to the correct result. It may be that in prematurely discarding complex legal justifications for their actions, or in ignoring legal history, judges leave aside not just a devious route, but the only one sufficiently well sign-posted to protect them from being diverted down the dead-end branch paths towards which counsel will entice them. Such as the case when judges shortened the phrase "we have the right to interfere where there is procedural ultra-vires" to simply "we have the right to enforce fair procedure".

The contrast between the rationale of early natural justice decisions and the views which have been expressed of late are striking. The traditional view was that natural justice "was enforced as an implied statutory requirement, so that failure to observe it meant that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void".(31) In COOPER v. WANDSWORTH BOARD OF WORKS Erle C.J. made it clear that this was the basis on which the court interfered to declare illegal the exercise of a statutory power in breach of natural justice:

> I think.... that many exercisesof the power of a district board would be in the nature of judicial proceedings.... and the matter is to be decided according to judicial forms. I take that to be a principle of very wide application, and applicable to the present case; and I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision.(32)

To Chief Justice Erle therefore, the courts enforced fair procedure because breach of natural justice resulted in excess of jurisdiction, rendering any exercise of power ultra vires. In more recent times however the courts have not kept the issues so clear. Thus, we find O'Halloran, J.A., stating that there are three possible situations in which habeas corpus may issue with certiorari in aid: when orders are "made without jurisdiction or in excess of jurisdiction or in violation of the essentials of justice...."(33) In JIM PATRICK LTD. v. UNITED STONE WORKERS Gordon, J.A., expressed the view that "[e]ven when the Board apparently acts within its jurisdiction, if there is a denial of natural justice certiorari will always lie".(34)

The JIM PATRICK LTD. case can, of course, be explained consistently with previous decisions if it is read as meaning that "a tribunal otherwise acting within jurisdiction may lose jurisdiction through a denial of natural justice...."(35) A number of recent cases have lead Reid and David to conclude that

> ....certiorari lies equally to a denial of natural justice or to an error of jurisdiction, and past uncertainty about whether the former amounted to the latter has now been resolved. It is settled that a denial of natural justice amounts to an error of jurisdiction.(36)

If indeed the law was settled at the time of the second edition of Reid and David's "Administrative Law and Practice" in 1978 it is unfortunate that nobody informed the Supreme Court of Canada. In HARELKIN v. THE UNIVERSITY OF REGINA a majority of that court held that breach of natural justice is no one and the same as jurisdictional error. Nor is this simply a matter of mere academic interest, for the Court went on to hold that while lack of jurisdiction renders a decision void ab initio, breach of natural justice renders it voidable only. The point of the exercise was to force a student requested to leave University to exhaust all possible internal appeals before seeking certiorari. Because, as a matter of logic, a nullity cannot be appealed (there is no decision to appeal from) the Court was forced to reason as it did if it was to reach the desired result. Mr. Justice Beetz (speaking also for Martland, Pigeon, Pratte, J.J.; Dickson, Spence, Estey, J.J. dissenting) reasoned as follows:

> In the case at bar, it cannot be doubted that the committee of the council had jurisdiction to hear and decide upon appellant's application or memorial. There was no want of jurisdiction. In the exercise of this jurisdiction, the committee of the council erred in failing to observe the rules of natural justice. While it can be said in a manner of speaking, that such an error is "akin" to jurisdictional error, it

> does not in my view entail the same type of nullity as if there had been a lack of jurisdiction in the committee. It simply renders the decision of the committee voidable at the instance of the aggrieved party and the decision remains appealable until quashed by a superior court or set aside by the senate.(37)

It is regrettable that a majority of the Supreme Court concurred with Beetz's judgment. While it may not be at once apparrent, the reasoning of the majority amounts to an oblique (and unintentioned) attack on the very under-pinnings of our constitution. Moreover, the "balance of convenience" argument which the majority utilized to demonstrate the good sense behind of the result does not weigh as heavily in their favour as Mr. Justice Beetz apparantly believed.

Taking the constitutional objection first, five points of a preliminary nature should be noted:

(1) The touchstone of parliamentary democracy in Canada is the supremacy of the Queen in Parliament.

(2) There can be no other legal authority save only as authorized by the sovereign legislature.

(3) The corollary of this is that where a sovereign legislature confers a power upon a lesser authority no other person or tribunal can interfere with the legitimate exercise of that power.

(4) The legislatures rely upon the superior courts to ensure that the limits of jurisdiction given to other tribunals are not exceeded. Thus, if any body which has powers conferred upon it by the legislature attempts to extend its jurisdiction beyond

that authorized by enactment such action is ultra vires and void. Whether any given act does in fact exceed jurisdiction is a question of law to be decided by the courts.

(5) Following from point #3 above, the Courts cannot interfere with any exercise of power which is within jurisdiction.

The doctrine of ultra vires thus lies at the heart of administrative law in those countries which have inherited a British system of parliamentary democracy. While it may have been stretched to such an extent as to be no longer easily recognized, the doctrine must not be broken. It is the sole link between the principles of administrative law and the constitutional system upon which they rest. To ignore it is to dimish, not to enhance, the Rule of Law. History reveals that

> [t]he technique by which the courts have constructed their system for the judicial control of powers has been by stretching the doctrine of ultra vires.... they can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament.... Realising that their task is to protect the citizen against unfairness and abuse of power, they build up a body of rules of administrative law which they presume that Parliament wishes them to enforce. But for this purpose, and subject to one exception, they have only one weapon, the doctrine of ultra vires. This is because they have no constitutional right to interfere with action which is within the powers granted (intra vires): if it is within jurisdiction, and therefore authorised by Parliament, the court has no right to treat it as unlawful.(38)

Once this is recognized it is clear that there is no room for a concept of "voidable for excess of jurisdiction" such as was applied by Beetz, J., in the HARELKIN case. For a judge to take such an approach is to effectively set himself above the legislature. It leaves to him the ultimate policy choice as to the restraints that should be placed upon the exercise of administrative powers. The Rule of Law gives way to a rule of individual discretion in which the enforcement of even the most clearly recognized procedural "rights" will depend upon which judge hears a particular case.

Nor can it be argued that broad concerns of public policy dictate that the judge should have this discretion regardless of the finer points of constitutional law. Considerations of this sort would appear to have weighed heavily with the majority in the HARELKIN case. Having held that internal appeals must be exhausted before seeking remedy through the courts, Mr. Justice Beetz had this to say:

> To hold otherwise would produce undesirable practical effects. For instance, an aggrieved student who had less time than appellant and who cared more about the expenditure could not appeal directly to the senate; he would have to seek relief from the courts, go back to the committee of the council, and from there to the senate, if need be. A purely conceptual view of absolute nullity which would, in this type of case, cause such inconvenient and impractical results cannot, in my view, be theoretically sound.(39)

Even if it is granted that the judicial perception of public policy warrants interference with the doctrine of ultra vires, it is by no means clear that the Beetz analysis of expediency is correct. Basically, proceedings can progress in one of four possible ways following a breach of natural justice at the initial hearing:

COURSE "A"	hearing - *certiorari* - hearing - appeal
COURSE "B"	hearing - appeal (favourable decision)
COURSE "C"	hearing - appeal (unfavourable decision) - *certiorari* - hearing - appeal
COURSE "D"	hearing - appeal - hearing - appeal

The Supreme Court of Canada would not permit the complainant to pursue course "A". Course "B" certainly is the most expedient of the three. There is however no compelling reason to believe that justice will be served better on appeal than at the hearing stage: the majority ignore what Dickson, J., labels the "dynamic of ascending rigidity".(40) In all likelihood, a complainant will be forced to pursue course "C"; clearly a more involved process than if he had been permitted to seek *certiorari* in the first place. In any event, even if the appellate body wished to respond to the breach of fair procedure, the proper approach would normally be to send the main issue back down to the lower level for a hearing in accordance with natural justice (course "D"):

> If the appeal body were specifically charged with determining whether the lower decision was properly made, and if not, that it should remit the matter to the lower level for re-hearing, the matter might be different...."(40)

Any other course would in effect deprive the person aggrieved of his right to appeal. At law he is entitled to procedural fair play both at the initial hearing and at such appeals as are provided for. The reasons why course "D" is to be so greatly preferred over course "A" are not at once apparent.

In deciding HARELKIN Mr. Justice Beetz laboured under the misapprehension that a strict ultra vires approach to the problem before him would have the result of forcing complainants to come to the court immediately. In fact, however, the result would be to leave the choice of the route to be followed to the person aggrieved. It was noted above that the pursuance of internal appeals will not constitute a waiver of the rights to procedural fair play, provided only that the person complaining made his objections known to the tribunal itself.(42) That being the case, there is no reason why the impecunious complainant should not work his way up the ladder of internal appeals before taking the final leap into a court-room fray. It is true that the court may hold all the appeals to have been of no effect because made from a 'void' decision. As Professor de Smith put it, an appeal in the strict sense cannot

> cure the vice of the original determination for one cannot appeal against a nullity and the appellate proceedings should also be treated as void.(43)

This however is precisely the result the person aggrieved seeks. Conversely, should the internal appellate body reach a decision favourable to him he will be taken to have "waived" whatever procedural rights he would otherwise have been entitled to. The tribunal's decision will thus become unimpeachable.

Both constitutional considerations and expediency would therefore seem to impel the courts to approach the question of the exhaustion of internal appeals in a manner quite different to that favoured by the majority of the Supreme Court of Canada in HARELKIN.(44) What, however, of the case authority which apparently supports the majority view? Such authority gives rise to four main lines of argument, based on:

(1) cases using the word "voidable" to describe decisions reached in breach of natural justice;

(2) KING v. UNIVERSITY OF SASKATCHEWAN;

(3) WHITE v. KYZYCH;

(4) the discretionary nature of the prerogative remedies.

Each of these lines of argument will be dealt with in turn.

(1) "VOID" vs. "VOIDABLE"

In many decisions both in Canada and in other common law countries, breach of natural justice has been said to render a decision "voidable". Thus, in RE DAIGLE, Pratte, J., of the Federal Court Trial Division said that a failure of the Canadian Transport Commission to comply with the "requirements of the *audi alteram partem* rule renders it's decision voidable *ab initio*".(45) The problem here is purely linguistic, for while it is true in one sense that breach of natural justice renders a decision voidable *ab initio*, in another sense nothing could be more misleading. Before the HARELKIN case the position was reasonably clear.(46) In England Lord Diplock stated the issues involved with admirable clarity in HOFFMAN-LA ROCHE v. SECRETARY OF STATE FOR TRADE AND INDUSTRY:

> It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in alw than to render the instrument incapable of ever having had any legal effect....(47)

The problem has arisen because the orders of tribunals enjoy a presumption of validity(48) and have legal effect until the contrary is declared by a court of law. Any other approach would have the undesirable effect of forcing tribunals to seek a court order affirming the validity of each and every of their decisions before they could act upon them. Professor Wade acknowledged that

> [i]n this sense every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that every matter of law is a matter for the court.(49)

For this reason, "[a] case could be made for using either term [void or voidable] in relation to invalid Acts".(50) Nevertheless, "so long as the ultra vires doctrine remains the basis of administrative law, the correct epithet must be 'void'".(51) In HARELKIN the Supreme Court of Canada simply took the more accurate (but theoretically wrong) descriptive term and applied it to what they conceived to be its logical effect. The result provides potent evidence in support of Professor Wade's lament that "[j]udicial uncertainty over the fundamentals of administrative law has, unfortunately, now become common".(52)

(2) KING v. UNIVERSITY OF SASKATCHEWAN

In this earlier case dealing with a student of a Saskatchewan University Mr. Justice Spence, speaking for a unanimous Supreme Court, said:

> If there were any absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee.(53)

In HARELKIN's case Beetz, J., had this to say about the KING decision:

> Spence, J., expressed a general principle in holding that the denial of natural justice in the earlier proceedings could be cured in appeal, and implicitly but necessarily, that the decision appealed from was not a complete nullity since it could be appealed. .... KING implies that such a decision stands until it is squashed or set aside and it is not therefore, an absolute nullity.(54)

It is submitted that the Beetz analysis is incorrect for two reasons. First, recognition of the fact that a conclusion was "appealed" does not necessarily imply that the courts considered the initial conclusion valid at law. That the parties go through unnecessary and legally meaningless proceedings is no concern of the court's. Secondly, as was pointed out in the dissent in HARELKIN's case, the so-called "appellate tribunal" before which King appeared was in fact the only body which had jurisdiction to decide the issue in question. "[t]he 'appeal' really amounted to a rehearing from the beginning by the only body empowered to grant degrees".(55) It was the senate appeal committee and not the lower tribunal which exercised original jurisdiction.

In light of the factors which have been discussed previously in this section it would be better if the dicta of Mr. Justice Spence in KING v. UNIVERSITY OF SASKATCHEWAN were narrowly construed as relating only to the particular facts of the case then before him. It is instructive to note that this is the approach which was taken by a minority of judges in the HARELKIN case, amongst whom Spence himself is counted.

(3) WHITE v. KUZYCH

In WHITE v. KUZYCH the Privy Council on appeal from British Columbia considered the meaning to be given to the by-laws of a trade union. That case involved the interpretation of a provision which prohibited members from taking their intra-union disputes to the courts until after all internal remedies had been attempted. In holding this clause to be effective to force exhaustion of internal appeals Viscount Simons said:

> "Decision" in the by-law mean "conclusion". The refinement which lawyers may appreciate between a tribunal's "decision" and a conclusion pronounced by a tribunal which, though within the tribunal's jurisdiction, may be treated, because of the improper way in which it was reached, as no decision at all and therefore incapable of being subject to appeal, cannot be attributed to the draftsmen of these by-laws or to the trade-unionists who adopted them as their domestic code.(56)

Whatever may be the merit of this view when applied to private clubs which have drawn up their own set of rules, it loses force considerably in cases where professional lawyers have drafted a code on instruction from the persons to be bound by it. In the field of statutory interpretation it should have no force at all. It was previously noted that the normal rule applied by the Supreme Court of Canada is that words which have received a judicial construction will be given the same interpretation when used in an Act of Parliament: the common law is the best guide of legislative intention. This view was expressly endorsed by Pigeon, J., (speaking also for Martland and Judson, JJ.) in HOWARTH v. NATIONAL PAROLE BAORD.(57) Nevertheless, the majority endorsed the view that in the HARELKIN case

> the statute is in a sense the domestic code of the University of Regina and is meant to be applied by layman (sic.) rather than by lawyers. It ought not to be construed in any narrow technical way. I am of the view that it bears a construction similar to that of the by-laws in WHITE v. KUZYCH.(58)

One is bound to ask where such reasoning will eventually lead. Statutes apparently of two types: those to be read and understood by laymen, and those for lawyers. Even assuming that this division could be relatively easily made, innumerable problems would arise. Stare decisis would provide no guide to the interpretation of statutes of the first type. Legislators would be at a loss as to how to express themselves so as to give effect to their intentions; laymen would be able to obtain no professional guidance as to the meaning to be attributed to statutes affecting them. Is all legislation creating tribunals composed of laymen of the first type? What of an Act concerning personal income tax? Would it be better interpreted by laymen (by whom it is to be applied) or lawyers? What of Highway Traffic Act? Criminal law statutes? The list of doubtful legislation could go on almost endlessly.

The extension of WHITE v. KUZYCH reasoning into the statutory area is regrettable, for it opens the door to any number of possible undesireable developments. Even if the HARELKIN case is contrued as narrowly as possible on this point it has the ironic result that the tribunal which conscientiously seeks legal advice as to the meaning of its incorporating statute may actually be in a worse position than the casual tribunal which relies solely upon its own haphazard interpretation. It is highly desirable that the Supreme Court take their earliest opportunity to explain the application of WHITE v. KUZYCH in the statutory area and (hopefully) restrict it to the narrowest scope possible.

(4) THE DISCRETIONARY NATURE OF PREROGATIVE REMEDIES

"The principle that certiorari and mandamus are discretionary remedies by nature cannot be disputed."(59) This principle was recognized by both the majority and the dissenting judges in the HARELKIN case. Nevertheless, the discretion is not absolute, but is to be applied in accordance with various princples which the courts themselves have enumerated. Beetz, J., explains that

> [o]ver the years, the courts have elaborated various criteria which provide guidance as to how the discretion should be exercised. In the process, the area of discretion has been more or less reduced depending on the circumstances of each case. In some cases, particularly those involving lack of jurisdiction, courts have gone so far as to say that certiorari should issue ex debito justitiae.(60)

While Mr. Justice Beetz emphasizes that he believes there to be a discretion in the court even in cases involving lack of jurisdiction, his main argument is that this is a very strong discretion in cases "not of lack of jurisdiction, but of excess or abuse of jurisdiction such as those involving a breach of natural justice".(61) The main difference between the majority and minority judgments on this point is as to the sense in which breach of natural justice goes to jurisdiction. For reasons already discussed, the minority view is to be preferred, and certiorari should issue ex debito justitiae where there is breach of natural justice.

Thus, the last argument in support of the majority view in HARELKIN falls. Each of the four is open to severe criticism on the ground that the authorities do not in fact support the propositions for which they are cited. It has already been noted that the result is undesirable both as a question of expediency and because it would divorce natural justice cases from the main constitutional princples that underlay administrative law.

Despite its defects however, HARELKIN does represent the law applicable in Canada at the time of writing. The lower courts must apply it and both administrators and those subject to their powers must live by it. Nevertheless, the Surpreme Court may, if it is so minded, over-rule its own previous decisions. This is a power to be used sparingly and with a sense of responsibility to litigants and of due respect for previous, differently composed, benches. However, the HARELKIN decision is so seriously defective in its application of fundamental concepts that it is to be hoped that their Lordships will take the earliest opportunity to over-turn it.

CHAPTER V - FOOTNOTES

(1) see particularly H.W.R. Wade, Administrative Law, 4th ed. 1978; S.A. de Smith, Judicial Review of Administrative Action, 3rd ed., 1973; Rene Dussualt, Traite de Droit Administratif, 1974; David Reid and Hillel David, Administrative Law and Practice, 2nd ed., 1978.

(2) [1924] 1 K.B. 171 at 205.

(3) (1971) 29 C.L.J. 181 at 182.

(4) Wade, op. cit. 429.

(5) (1964) A.C. 40.

(6) Wade, op. cit. 536.

(7) ibid.

(8) per Dickson, J., in MARTINEAU v. MATSQUI INSTITUTION DISCIPLINARY BOARD, unreported decision of the Supreme Court of Canada, 13/12/79, at p. 25 of transcript.

(9) While RIDGE v. BALDWIN may have marked a turning point in the common law it was by no means a radical decision. If anything it was counter-revolutionary, re-establishing the status-quo. In 1700 Holt, C.J., expressed his views in R. v. CLAMORGANSHIRE INHABITANTS (1700) 1 Ld. Raym. 580: "For this court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here."

(10) R.S.C. 1970 c.10 (2nd Supp.); ss.18 and 28 are to be found in Appendix II of this thesis.

(11) per Pigeon, J., HOWARTH v. NATIONAL PAROLE BOARD [1975] 50 D.L.R. (3d) 349 at 351; see however N.M. Fera, (1978) 4 Q.L.J. 148.

(12) s.28(3), FEDERAL COURT ACT.

(13) supra., at 353, per Pigeon, J.

(14) ibid. at 351.

(15) [1979] 1 S.C.R. 496 at 501.

(16) unreported decision of the Supreme Court of Canada, judgment 13/12/79, at p. 11 of transcript, per Dickson, J.

(17) ibid. It should not be taken from this that Dickson endorses the distinction between fairness and natural justice. At pp. 19-20 of the transcript he refers to being"forced to cast judicial review in traditional classification terms, as is the case under the FEDERAL COURT ACT...." At p. 26 he asserts that "[i]n general, courts ought not to seek the distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unweildy conceptual framework. The FEDERAL COURT ACT, however, compels classification for review of federal decision-makers".

(18) MARTINEAU (#2), supra., per Dickson, J., at p. 27.

(19) HOWARTH v. N.P.B., supra., per Dickson, J., at p. 356-7.

(20) This, in effect, was the approach of the minority in MARTINEAU (#2), supra.

(21) NORTH BRITISH RAILWAY v. BUDHILL COAL AND SANDSTONE CO. [1910] A.C. 116 at 127, per Lord Loreburn, L.C.

(22) MARTINEAU (#2), supra., per Dickson, J., at p. 12.

(23) CALGARY POWER v. COPITHRONE [1959] S.C.R. 34.

(24) L'ALLIANCE DES PROFESSEURS CATHOLIQUES DE MONTREAL v. LABOUR RELATIONS BOARD (Quebec) [1953] 2 S.C.R. 140; see discussion above, in Chapter 2(1)(iii).

(25) [1964] A.C. 40.

(26) NAKKUDA ALI v. JAYARATNE [1951] A.C. 66.

(27) This apparantly was the (dissenting) view of Heald, J., in POPOVICH EQUIPMENT CO. v. R. [1979] 79 D.T.C. 5079 at 5081.

(28) see S.A. de Smith, Judicial Review of Administrative Action, Stevens & Sons Ltd., London (1959) at 274.

(29) MARTINEAU (#2), supra., per Dickson, J., at 19.

(30) RE H.K. (an infant) [1967] 2 Q.B. 617, discussed above, introduction to Chapter 2.

(31) H.W.R. Wade, Administrative Law, Clarendon Press, Oxford, (4th ed. 1977) p. 448.

(32) [1863] 14 C.B. (N.S.) 180. See also SEGAL v. CITY OF MONTREAL [1931] S.C.R. 460 at 471, per Lamont J. His Lordship expressed the view that, in deciding whether or not grant prohibition (and also, therefore, certiorari), the court "is concerned only to see that (the tribunal) did not transgress the limits of jurisdiction". quaerae: whether this dictum is confined in its application to article 1003 of the Quebec Code of Civil Procedure as it stood at the time?

(33) ex. p. YUEN YICK JUN [1940] 2 D.L.R. 432 at 433.

(34) [1950] 21 D.L.R. (2d) 189 at 202. See also RE McKAIG [1954] 108 C.C.C. 268 (B.C.); RE HALLIWELL AND WELFARE INSTITUTIONS BD. (B.C.) [1966], 56 D.L.R. (2d) 754; R. v. CALGARY (CITY); ex. p. SANDERSON [1966] 53 D.L.R. (2d) 477; ex. p. WORLDS [1968], 65 D.L.R. (2d) 252 (Alta.).

(35) Reid and David, Administrative Law and Practice, Toronto: Butterworth & Co. (Canada) Ltd., (2nd ed., 1978) p. 215.

(36) ibid. at 214-215. Among the cases cited in support of this statement are R. v. BOTTING [1966] 2 O.R. 121, at 136, per Laskin, J.A.; R. v. CANADA LABOUR RELATIONS BOARD; ex. p. BREWSTER TRANSPORT CO. LTD. [1966], 58 D.L.R. (2d) 609 at 615; RE TORONTO NEWSPAPER GUILD & GLOBE PRINTING CO., [1951] O.R. 435; 2 S.C.R. 18.

(37) [1979] 26 N.R. 364 at 386, para. 50.

(38) H.W.R. Wade, op. cit., p. 42. The exception to which Wade refers is error of law on the face of the record.

(39) 26 N.R. 364 at 387, para. 51, per Beetz, J.

(40) ibid. at 415, para. 121, per Dickson, J.

(41) ibid. at 414 - 415, para. 120, per Dickson, J., dissenting.

(42) in Chapter 3(3)(ii).

(43) Judicial Review of Administrative Action, Stevens & Sons Ltd., London (3rd ed., 1973) p. 210.

(44) supra.

(45) [1975] F.C. 8 at 10 E.

(46) see RIDGE v. BALWIN [1964] A.C. 40; ANISMINIC LTD. v. FOREIGN COMPENSATION COMMISSION [1967] 3 W.L.R. 382 (C.A.), [1969] 2 A.C. 147 (H.L.); RE WILBY & MINISTER OF MANPOWER AND IMMIGRATION [1975] 59 D.L.R. (3d) 146, at 150 - 151 (F.C.A.); RE KNAPMAN AND BD. OF HEALTH FOR SALTFLEET TWP. [1954] O.R. 360; TIPPETT v. INTERNATIONAL TYPOGRAPHICAL UNION [1976] 63 D.L.R. 522 at 543 (B.C.S.C.); LAPOINTE v. L'ASSOCIATION DE BIENFAISANCE ET DE RETRAITE DE LA POLICE DE MONTREAL [1906] A.C. 535 (P.C.); DENTON v. AUCKLAND CITY [1969] N.Z.L.R. at 1021 - 22; HOGGARD v. WORSBOROUGH U.D.C. [1962] 2 Q.B., 93; KANDA v. GOVERNMENT OF MALAYA [1962] A.C. 322 (P.C.). These cases are cited by Dickson, J., in his dissenting judgment in HARELKIN, 26 N.R. 364 at 408 - 409.

(47) [1975] A.C. 295 at 365.

(48) See HOFFMAN - LA ROCHE, supra.

(49) Administrative Law, Clarendon Press, Oxford, (1977; 4th ed.) p. 299.

(50) ibid. at 300.

(51) ibid. at 300.

(52) ibid. at 43.

(53) KING v. UNIVERSITY OF SASKATCHEWAN [1969] S.C.R. 678 at 689.

(54) HARELKIN, supra., at 384, para. 44, 45.

(55) supra., at 413, para. 116.

(56) [1951] 3 D.L.R. 641 at 650 - 651.

(57) See notes 11, 20 above.

(58) HARELKIN, supra., at 388, para. 54.

(59) HARELKIN, supra., at 377, para. 29, per Beetz, J.

(60) ibid., para., 30, per Beetz, J.

(61) ibid., para., 33, per Beetz, J.

CHAPTER VI - CONCLUSION

(1) POLICY ASSESSMENT

For the most part this thesis has aimed to describe the present state of the law in Canada. It is true that several recent decisions have been criticized, and that in some places the current state of the law has been distilled from a combination of recent, less than conclusive, dicta and previous decisions of many courts both in Canada and elsewhere. In some instances too, an attempt has been made to establish a principle on the grounds that it follows logically from a previous decision so that one is put in mind of Lord Halsbury's warning:

> A case is only authority for what it actually decided. I entirely deny that a case can be quoted for a proposition that may seem to logically follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.(1)

Nevertheless, the object throughout has been to sketch an up - to - date outline of Canada's common law rules of procedural fair play. This is first and foremost a descriptive work.

The area is one which has developed rapidly, and there has scarcely been time to assess the altered parameters of natural justice following one land-mark case before the next has been decided. With the Supreme Court of Canada's NICHOLSON decision now two years old, and with eight months to reflect upon the implications of MARTINEAU (#2), however, the law may have at last reached its destination. There will, no doubt, be further modifications and refinements to the concepts which have developed, but the main re-evolution has been accomplished, and it is not unreasonable to expect a period of relative stability (if not calm!) to set in. Until those refinements and further modifications are made, however, there will be considerable apprehension in some circles. Any development of the common law is met with a mixed response and, no matter how strong the impetus of change, there are many who would prefer to live with a demon they know than with a (perceived) devil they don't.

Accepting that the state of the law is as has been described in the preceding Chapters, the question which must be met is whether the recent changes have been desirable, or whether our judiciary has unleashed a monster they will be unable to control. Perhaps the cry which will be raised loudest and most frequently is that the new natural justice spreads it's net too widely, that an administrative system no longer shielded by the "super-added" test of judicialness will be forced to dedicate most of it's energy to holding innumerable and never-ending hearings. This objection is unfounded for two reasons. In the first place, it is based on the presumption that the old classification approach provided a shield which was impenetrable no matter how unfair the judge hearing the application for certiorari or declaration may have felt the tribunal's actions to have been. That this is not true is demonstrated by CAMPEAU CORPORATION v. COUNCIL OF THE CITY OF CALGARY(2) where the Alberta Court of Appeal held that even bodies which are primarily "legislative" or "administrative" may perform some functions which involve a "quasi-judicial" component, and that in such cases natural justice was applicable. The result was that the characterization shield could - even under the old approach - be by-passed almost at the whim of the Court. Secondly, because the courts will consider administrative inconvencience in determining the requirements of natural justice in any given case, they will not impose obligations greater than is consistent with public policy. The duty imposed may range from the most attenuated form of "hearing" to court-room like procedure, but it will never be more than the administrative system can bear.

Indeed, the judiciary has shown itself so amenable to the concerns of administrators as to draw criticism from another direction altogether. Decisions such as Ex p. HOSENBALL(3) and MALLOCH v. ABERDEEN CORPORATION(4) have raised concern in some quarters that the traditional protections provided by natural justice are seriously threatened. The argument here is roughly to the effect that once it is held in one context that there has been a fair hearing without notice of the case to be met, it will not be long before the requirement of reasonable and adequate notice is abandoned altogether. It is true that a judge who is in any case inclined to uphold the decisions of tribunals may grasp at such straws to extend the range of circumstances in which natural justice is held to have a minimal content. However, it would be improper to impute such motives to our judiciary. In any event, the very flexibility of the law will encourage the courts to sincerely seek to enforce a standard of natural justice which will be fair to complainants and administrators alike. They will be forced to deal openly with the issues that actually influence their decisions, and it will no longer be possible to hide the policy reasons for their holdings behind a terminological smoke-screen or a trite recitation of dicta from cases that may have arisen in very different circumstances. The quality of reasoning employed in natural justice cases will no doubt improve for being exposed to public scrutiny:

> [I]f.... proceedings are to be fair to the citizen reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have been properly thought out.(5)

Even under the COPITHORNE approach, the content of natural justice was (usually) recognized to be a flexible standard. Yet there is little evidence of a judicial tendency to enforce only minimal standards where serious interests are at stake. On the contrary, the least satisfactory decisions have been those, such as RE CANADIAN FOREST PRODUCTS,(6) where the judges have conceived natural justice as having an immutable content, and consequently held that there is no enforceable standard of fair play whatsoever in cases where the total weight of natural justice would cause serious disruption to the administrative process.

A third line of criticism of the new natural justice might be that it is too vague, that it imposes a duty which is too imprecisely defined to offer any positive guidance to persons involved in decision making. Against this it may be noted that the law sometimes must be stated in a manner which is less than precise. The infinitely variable combinations of facts and circumstances that may arise in human affairs makes it desirable that there be some areas in which the law is stated in terms of a few broad principles rather than of innumerable hard and fast rules. Lord Reid's comparison of the reasonable administrator in natural justice with the reasonable man of negligence law has been noted.(7) Indeed, the new law of natural justice, as evolved through cases such as RIDGE v. BALDWIN(8) and MARTINEAU (#2),(9) is a welcomed development which at last provides an administrative law equivalent to the reasonable man test of DONOGHUE v. STEVENSON.(10) In any event, it should not be thought that the former approach to natural justice was free of the charge of vagueness, for, even at the time of the undoubted supremacy of NAKKUDA ALI(11) and COPITHORNE,(12) both the classification of functions and the appropriate content of natural justice were matters regarding which their could be no certainty.(13) The new approach will at least put the real reasons for decisions on the public stage.

In the end therefore, recent developments in the natural justice area are to be welcomed. There will, no doubt, be rivers to be crossed and pitfalls to be avoided as the law progresses. The very flexibility of the duty, it's greatest strength, will itself cause problems as the concept of the reasonable administrator is developed. There will, no doubt, be cases in which the judges will lean too heavily in favour of either the complainant or the decision-maker in coming to their decisions. Nevertheless, the new flexibility will have the very desireable effect of ensuring that the courts openly grapple with the issues which in fact determine the result. Ultimately we will see the development of a truly coherent body of law which will provide prospective guidlines for administrators and the persons subject to their powers alike.

(2) SYNOPSIS

This thesis has been primarily concerned with outlining an approach to natural justice which is consistent with recent developments in Canadian law. Much time has been sepent in attempting to dispose of views which apparently are inconsistent with the approach here preferred. The broad outline of the new law may, however, be simply stated in the form of nine propositions:

(1) "Fairness" is but a synonym for "natural justice".

(2) The duty to act fairly (or, in complainance with the principles of natural justice) arises whenever "rights" are affected.

(3) "Rights" is not to be understood in a jurisprudential sense, but refers to any significant interest.

(4) The duty is "implied at law", and is not dependent upon the ability of the Court to find an "implication in fact".

(5) Natural justice is, thus, a common law principle of the most fundamental nature. Failure to comply with the requirements of fair procedure will only be excused where there is an express statutory provision permitting this or where overriding policy considerations come into play.

(6) The formulation of "policy" is outside the supervisory jurisdiction of the courts. This, rather ill-defined, lacuna apparently envisages situations where a hearing couldn't possibly make any difference. The courts are not, however, in an ordinary case entitled to consider whether a hearing would on the

facts have made any difference, for it is not their duty to conduct a trial within a review.(14)

(7) The obligation of decision-makers is to follow a procedure which is as fair as possible without unduly interfering with the efficiency of his tribunal. The requisite content of natural justice or fairness is variable both as to its components and as to the quality of each individual component.

(8) The reasonableness test of content may give rise to duties covering a broad spectrum of possibilities. These range from the most attentuated form of hearing, where even notice of the case to be met need not be given, to proceedings approximating to court-room procedure.

(9) The remedies available to persons aggrieved by administrative decisions are, on the whole, adequate. There are, however, problems in Canadian law regarding the operation of the FEDERAL COURT ACT (15) and the necessity of exhausting internal appeals before seeking judicial review.

When all is said and done, therefore, the new law of natural justice is rather simply stated. It is hoped that this thesis has not made heavy going of a simple concept. If indeed the conclusion seems too simple, too obvious, for a discussion of this length, consolation is taken from the words of former Ontario Chief Justice McRuer:

> One can write a text-book on administrative tribunals and when that has been done one arrives back at certain very fundamental princples, and they have been enunciated time and time again.(16)

CHAPTER VI - FOOTNOTES

(1) QUINN v. LEATHEM [1901] A.C. 495 at 506.

(2) [1978] 12 A.R. 31.

(3) R.v. HOME SECRETARY, ex p. HOSENBALL [1977] 1 W.L.R. 766.

(4) [1971] 1 W.L.R. 1578.

(5) FRANKS COMMITTEE on Administrative Tribunals and Enquiries Cmnd. 218 (1957), para. 98.

(6) [1960] 24 D.L.R. (2d) 753.

(7) in RIDGE v. BALDWIN [1964] A.C. 40.

(8) ibid.

(9) decision of the Supreme Court of Canada 13/12/79.

(10) [1932] A.C. 562.

(11) [1951] A.C. 66.

(12) [1959] S.C.R. 24.

(13) See S.A. de Smith, "Judicial Review of Administrative Action", Stevens & Sons Ltd., London (1st. ed., 1959), esp. at pp. 50-51; 109.

(14) See PERFORMANCE CARS 34 P. & C.R. 92; GEORGE v. SECRETARY OF STATE [1974] J.P.L. 382.

(15) R.S.C. 1970 c.10 (2 Supp.).

(16) RE JACKSON AND ONTARIO LABOUR RELATIONS BOARD [1955] O.R. 83 at 95.

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APPENDIX I

THE ADMINISTRATIVE PROCEDURES ACT

R.S.A. (1978)

CHAPTER 2

1. This Act may be cited as THE ADMINISTRATIVE PROCEDURES ACT. [1966, c. 1, s.1]

2. In this Act,

   (a) "authority" means a person authorized to exercise a statutory power;

   (b) "party" means a person whose rights will be varied or affected by the exercise of a statutory power or by any act or thing done pursuant thereto;

   (c) "statutory power" means an administrative, quasi-judicial or judicial power conferred by statute, other than a power conferred on a court of record of civil or ciminal jurisdiction or a power to make regulations, and for greater certainty, but without restricting the generality of the foregoing, includes a power

      (i) to grant, suspend or revoke a charter or letters patent, or

      (ii) to grant, renew, refuse, suspend or revoke a permission to do an act or thing which, but for the permission, would be unlawful, whether the permission is called a licence or permit or certificate or is in any other form, or

      (iii) to declare or establish a status provided for under a statute for a person and to suspend or revoke that status, or

      (iv) to approve or authorize the doing or omission by a person of an act or thing that, but for the approval or authorization, would be unlawful or unauthorized, or

      (v) to declare or establish a right or duty of a person under a statute, whether in a dispute with another person or otherwise, or

(vi) to make an order, decision, direction or finding prohibiting a person from doing an act or thing that, but for the order, decision, direction or finding, it would be lawful for him to do or any combination of those powers.
[1966, c. 1, s. 2]

(3) The Lieutenant Governor in Council may, by order,

(a) designate any authority as an authority to which this Act applies in whole or in part,

(b) designate the statutory power of the authority in respect of which this Act applies in whole or in part, and

(c) designate the provisions of this Act which are applicable to the authority in the exercise of that statutory power, and the extent to which they apply, and this Act only applies to any authority to the extent ordered under this section.
[1966, c. 1, s. 3]

(4) Where

(a) an application is made to an authority, or

(b) an authority on its own initiative proposes, to exercise a statutory power, the authority shall give to all parties adequate notice of the application which it has before it or of the power which it intends to exercise.
[1966, c. 1, s. 4]

(5) Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority

(a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,

(b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail

(i) to permit him to understand the facts or allegations, and

(ii) to afford him a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,

and

(c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

[1966, c. 1, s. 5]

6. Where an authority has informed a party of facts or allegations and that party

(a) is entitled under section 5 to contradict or explain them, but

(b) will not have a fair opportunity of doing so without cross-examination of the person making the statements that constitute the facts or allegations, the authority shall afford the party an opportunity of cross-examination in the presence of the authority or of a person authorized to hear or take evidence for the authority.

[1966, c. 1, s.6]

7. Where by this Act a party is entitled to make representations to an authority with respect to the exercise of a statutory power, the authority is not by this Act required to afford an opportunity to the party

(a) to make oral representations, or

(b) to be represented by counsel,

if the authority affords the party an opportunity to make representations adequately in writing but nothing in this Act deprives a party of a right to make oral representations or to be represented by counsel conferred by any other Act.

[1966, c 1, s. 7]

8. Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out

(a) the findings of fact upon which it based its decision, and

(b) the reasons for the decision.

[1966, c. 1, s. 8]

9. Nothing in this Act relieves an authority from complying with any procedure to be followed by it under any other Act relating to the exercise of its statutory power.

[1966, c. 1, s. 9]

10. Nothing in this Act

(a) requires that any evidence or allegations of fact made to an authority be made under oath, or

(b) requires any authority to adhere to the rules of evidence applicable to courts of civil or criminal jurisdiction.

[1966, c. 1, s. 10]

11. The Lieutenant Governor in Council may make regulations

(a) to prescribe the length of time that is reasonable for the giving of a notice in accordance with this Act, with respect to authorities generally or with respect to a specified authority,

(b) to prescribe forms of notices for the purposes of this Act, and

(c) to carry into effect the purposes of this Act.

[1966, c. 1, s. 11]

APPENDIX II

THE FEDERAL COURT ACT

R.S.C. 1970 c.10 (2 Supp.)

18. The Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(a) failed toobserve a principle of natural justice or otherwise acted beyond or refused to exercise it jurisdiction;

(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof, may either before or after the expiry of those ten days, fix or allow.

(3) Where the Court of Appeal has jurisdiction under this section to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the National Defence Act.